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#### Recommended Citation

Richard Delgado, *Pep Talks for the Poor: A Reply and Remonstrance on the Evils of Scapegoating Essay*, 71 B.U. L. Rev. 525 (1991).

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# REPLY ESSAY

## PEP TALKS FOR THE POOR: A REPLY AND REMONSTRANCE ON THE EVILS OF SCAPEGOATING

RICHARD DELGADO\*

In a Foreword to the Harvard Law Review's 1990 Supreme Court issue,<sup>1</sup> Robin West, a noted liberal, takes a giant step to the right. West correctly notes that the United States Supreme Court has severely restricted the rights and liberties of members of many outgroups.<sup>2</sup> Because liberal legalists traditionally rely on courts to protect individual freedoms, those freedoms are endangered by the Supreme Court's refusal to enforce nonpositive individual rights.<sup>3</sup> In response, West urges liberal legalists to rethink their strategy for obtaining the recognition and protection of individual rights and liberties.<sup>4</sup> Unfortunately, her solution abandons those whom she supposedly champions.

Borrowing ideas from Czechoslovakian reformer Vaclav Havel, West proposes that progressive people in the United States do two things: (i) leave

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<sup>1</sup> West, *The Supreme Court, 1989 Term—Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43 (1990).

<sup>2</sup> For example, West discusses three recent Supreme Court decisions. In *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990), pregnant minors lost the right to have an abortion to the extent that a state may require them to seek the permission of both parents or the state judiciary. West, *supra* note 1, at 79-85. In *Cruzan v. Director, Missouri Department of Health*, 110 S. Ct. 2841 (1990), individuals lost the right to die rather than be kept alive in a vegetative state, when a state decides that evidence of the desire to die in such circumstances must be clear and convincing. West, *supra* note 1, at 98-101. In *Employment Division v. Smith*, 494 U.S. 872 (1990), Native Americans lost the right to use peyote during holy sacrament whenever a facially neutral state statute criminalizes its use. West, *supra* note 1, at 53-54.

<sup>3</sup> West, *supra* note 1, at 52-53, 59, 102, 106 (arguing that the cases decided in the 1989 Term show that the Court will no longer be amenable to mandating individual rights).

<sup>4</sup> *Id.* at 60, 78, 79, 101-03, 106 (stating that the Court's emphasis on positivist "rules" rather than on moral principles indicates that it cannot be relied upon to uphold individual rights).

aside their fascination with and dependence on courts, and instead direct their energies and appeals to "the people" and their legislatures,<sup>5</sup> and (ii) couch these appeals not in the language of rights, but of individual moral *responsibilities*.<sup>6</sup> Instead of pleading to increasingly unresponsive judges, liberals should take the case for recognition of rights and protection of liberty directly to members of the legislature and to the citizenry.<sup>7</sup> Furthermore, rather than couching arguments in terms of inherent individual rights, liberal legalists should frame them as calls for individual moral *responsibility*, a notion that lies at the heart of the individual freedom that supports nonpositive rights.<sup>8</sup> At times, West speaks of these twin proposals as matters of prudence—what we ought to do in conservative times.<sup>9</sup> At other points, however, she suggests that the notion of responsibility is itself a superior framework for protecting freedom and human dignity, irrespective of the times.<sup>10</sup>

Whether based on prudence or principle, the shift West proposes is unfortunate. In showing that this is so, I hope to avoid the time-honored error of attacking her proposed paradigm shift through the shopworn liberal paradigm she so correctly jettisons. Every shift looks wrong to those caught up in the old regime.<sup>11</sup> Yet, one may still question legal and political reformers: how well does West's new approach square with the lived experience of members of our society? Will the new approach impose costs, and if so, on whom?

In this Reply Essay, I argue that West's proposal ignores history and misdiagnoses society's needs, and that its ill effects are likely to fall disproportionately upon the poor and minorities. If I am right, West's proposal is itself "irresponsible" and should not be adopted. Part I catalogues a number of defects in West's proposal: Who will bear the burden of her call for responsibility? Part II looks for the source of her mistake: How could an

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<sup>5</sup> *Id.* at 61, 79, 84, 95-96 (examining both Civic Republicanism's emphasis on communal political life and the need to shift the guardianship of individual liberty away from the courts and toward the public).

<sup>6</sup> *Id.* at 47, 65-66, 72, 78-79, 83, 91-92, 95-96, 101, 106.

<sup>7</sup> *Id.* at 61, 73, 79 (asserting that if the citizenry and political leaders act responsibly, then individual rights will be secured, thereby rendering unnecessary appeals to courts for the safeguarding of these rights).

<sup>8</sup> *Id.* at 79, 106.

<sup>9</sup> *Id.* at 84, 93 (applying the twin proposals specifically to the fight for reproductive rights and to criminal procedure).

<sup>10</sup> *Id.* at 47, 84, 93 (basing her proposal on prudence or strategy); *id.* at 65-66, 95-96, 101, 106 (justifying her proposal as a matter of principle).

<sup>11</sup> See T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970) (discussing the process by which scientific theories change and are supplanted). For an acerbic commentary on the process of (and resistance to) legal change, see Schlag, *Normative and Nowhere To Go*, 43 *STAN. L. REV.* 167 (1990) (suggesting that the routine of liberal humanism and normative legal thought is repetitive and useless outside the world of legal academia).

ostensibly progressive scholar have written as she did? Part III discusses what reformers should be doing in today's climate: If not the strategic retreat West urges, then what?

### I. DEFECTS IN THE RIGHTS-FOR-RESPONSIBILITIES APPROACH: WHO WOULD PAY?

West's is not the only voice that has been calling for liberals to temper their emphasis on rights in favor of responsibilities. Recently, Harper's Magazine published a colloquy on just that subject.<sup>12</sup> Additionally, this spring saw the announcement of a new scholarly quarterly, *The Responsive Community: Rights and Responsibilities*, edited by sociologist Amitai Etzioni, and aimed at re-examining society's balance between individual rights and social responsibilities.<sup>13</sup> This Part will suggest a number of reasons why I find this drift—particularly West's version of it—troubling.

#### A. Reason Number One: Who Would Be Found "Irresponsible"

A society's values are always majoritarian: "irresponsible" behavior is what those other people do.<sup>14</sup> The values and practices of you and me always seem unexceptionable to us (with a few blemishes here and there; nobody is perfect). Thus, West's call for individual responsibility is unlikely to focus scrutiny on corporate raiders,<sup>15</sup> sellers of junk bonds,<sup>16</sup> irresponsible savings-and-loan executives,<sup>17</sup> or developers who despoil the environment.<sup>18</sup>

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<sup>12</sup> *Forum, Who Owes What to Whom? Drafting a Constitutional Bill of Duties*, HARPER'S, Feb. 1991, at 43 (discussing whether talk of individual rights has undermined notions of obligation and community).

<sup>13</sup> See Thomas, *Freedom of Speech? Well, Not Always . . .*, Denver Post, Apr. 5, 1991, at 9B (discussing the case of restaurant workers fired for warning a pregnant customer of the dangers of consuming alcohol, and advocating their protection under the first amendment); Magner, *Probing the Imbalance Between Individual Rights*, Chron. of Higher Educ., Feb. 13, 1991, at A3 (taking a communitarian view of balancing individual rights with societal needs).

<sup>14</sup> See Delgado, *Norms and Normal Science: Toward a Critique of Normativity in Legal Thought*, 139 U. PA. L. REV. 933 (1991) (explaining that powerful groups in society define society's values, so that the values of minorities are considered inferior).

<sup>15</sup> E.g., Anders, *Small Investors Learn a Hard Lesson About Buy-outs*, Wall St. J., Feb. 20, 1991, at C1 (discussing the effects of leveraged buyouts on the small investor).

<sup>16</sup> E.g., Eichenwald, *Judge Who Gave Milken 10 Years Wants Him Eligible for Parole in 3*, N.Y. Times, Feb. 20, 1991, at A1, col. 1 (discussing a judge's decision to soften the punishment of an infamous white-collar criminal).

<sup>17</sup> E.g., Weinstein, *Professionals Not Blameless in Savings and Loan Scandal*, Nat'l L.J., Feb. 18, 1991, at 12 (arguing that blame should attach to the lawyers and accountants of the affected banks).

<sup>18</sup> E.g., Amoroso & Keenan, *Liability for Restoration Is Looming*, Nat'l L.J., Feb. 4, 1991, at 19 (noting the lack of judgments for natural resource damages despite federal and state statutory authority to recover for such injury).

It would also fail to focus on a corporate CEO who closes or relocates a factory, thereby plunging an entire city into poverty and chaos.<sup>19</sup>

A call for responsibility *could* be directed at those in power—politicians, corporate executives, and wealthy taxpayers—as well as at political dissidents, welfare mothers, and others whom society views as troublesome or deviant. Yet West's Foreword nowhere suggests that she has this redirection in mind, an omission I find troubling. West indicates that even in the rights-based paradigm, the rights of the powerful and privileged classes expand at the same time that the rights of outgroups contract.<sup>20</sup> A responsibilities-based paradigm would only exaggerate this tendency because the behavior of the *outgroups*, rather than that of those in power, would be called into question. Moreover, calling majoritarian behavior into question would fly in the face of one of West's rationales for the new focus, namely the need for quietism and a low profile for members of outgroups in a conservative era. After all, if one is trying to keep a low profile, then one would scarcely want to point a finger at a powerful person. Finally, even if West had this redirection in mind, but did not state it, the redirection contradicts truths of human nature—namely, that onerous duties such as taxation<sup>21</sup> and military service<sup>22</sup> are often shifted to those least able to resist. While budget cutbacks are directed toward services for the poor, entitlements and benefits for the middle class remain untouched.<sup>23</sup>

As West's own examples show, we reserve the label "irresponsible" for those who are *Other*. For instance, she decries recent efforts to expand rights of sexual autonomy, particularly the right to have an abortion.<sup>24</sup> She argues that instead we should demand that citizens have sex responsibly, have abortions only for good reasons, and otherwise open themselves to

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<sup>19</sup> The film *Roger and Me* (Warner Bros. 1989) graphically depicts the destitution caused by the closing of an automobile plant in Flint, Michigan.

<sup>20</sup> West, *supra* note 1, at 51 (describing how Christian children won the right to establish Bible study groups in public schools, and how political activists won the right to burn the flag as an expression of discontent).

<sup>21</sup> *E.g.*, THE REAGAN RECORD: AN ASSESSMENT OF AMERICA'S CHANGING DOMESTIC PRIORITIES (J. Palmer & I. Sawhill 2d ed. 1984) (stating that deregulation, tax changes and other measures led to a massive transfer of wealth from the working class to the wealthy); *see also* THE REAGAN EXPERIMENT: AN EXAMINATION OF ECONOMIC AND SOCIAL POLICIES UNDER THE REAGAN ADMINISTRATION (J. Palmer & I. Sawhill eds. 1982) (asserting that the income tax structure in the United States divides the tax burden among those with unequal ability to pay and results in tax cuts favorable to the rich).

<sup>22</sup> *E.g.*, Sirica, *More Minorities Serving in Gulf; Growth in Black, Female Ranks*, *Newsday*, Dec. 20, 1990, at 15 (Nassau and Suffolk ed.) (stating that Blacks constitute 23% of all-volunteer enlisted force, yet constitute only 13% of the general population).

<sup>23</sup> *E.g.*, Peterson, *The Morning After*, *ATLANTIC MONTHLY*, Oct. 1987, at 43, 62 ("[N]early all the painful and high-visibility cuts have been made in the 15 percent of the benefit programs that are means-tested.").

<sup>24</sup> West, *supra* note 1, at 67-68, 79-85.

scrutiny of their intimate conduct.<sup>25</sup> On whom will this new code of sexual responsibility fall? Not, I predict, on upper-class white males in positions of power who cut a wide swath through female society of the nation's capital. Rather, it will fall on single mothers of color who have sex and babies<sup>26</sup> out of personal choice, culture, or simply as a way of finding pleasure and meaning in otherwise unfulfilling lives.<sup>27</sup>

Consider also her discussion of the right to die.<sup>28</sup> As West frames it in the perspective of responsibility, the issue comes perilously close to a "right to live." Once society acts upon West's dismissal of traditional liberal anti-paternalism, it collectively assumes responsibility not only for restraining runaway life-support technology, but also for allocating scarce societal resources involving less extreme examples of medical technology. Under this approach, who will be urged to decline medical treatment, to die "responsibly"? Surely not those who can afford to prolong life by buying expensive treatments,<sup>29</sup> but rather the nonproductive, the poor, the infirm, and the aged.<sup>30</sup>

Consider, finally, her discussion of "responsible" speech.<sup>31</sup> According to

<sup>25</sup> *Id.* at 79, 81-85. For example, pregnant teenagers should, if possible, talk things over with a "loving parent," a suggestion unlikely to play well in the ghetto.

<sup>26</sup> To be sure, rights (e.g., to have sex) and entitlements (e.g., to well-baby care) stand on different footings. That *both* are being curtailed, however, demonstrates society's unwillingness to tolerate what it considers "irresponsible sex" or reproduction.

<sup>27</sup> R. BROOKS, *RETHINKING THE AMERICAN RACE PROBLEM* 111-14 (1990) (discussing the reasons for the high incidence of pregnancies among unwed teenage black women); *The Pain of Being Black*, *TIME*, May 22, 1989, at 120 (interview with Toni Morrison) (discussing societal response to black teenage pregnancy). The call for responsible sex also presumes that women in our society have total (or at least great) control over their reproductive abilities. This is not true, particularly for non-white women and those with little education. It is easy for college-educated, upper-class women (like West) to argue that abortion should not be readily available, or that access to it should be limited, or that resort to it should be "responsible," or that irresponsible women should pay the price of their misbehavior. That argument assumes, however, that everyone has the same level of education and access to contraceptive services—an assumption that flies in the face of what we (should) know. Restricting the right to an abortion, or even discouraging its exercise, increases the power of men vis-a-vis women, and falls disproportionately heavily on non-white, poor women.

<sup>28</sup> West, *supra* note 1, at 98-101.

<sup>29</sup> A recent report mentioned a physician who had obtained a fifth kidney replacement for himself. Interview with Michael Shapiro, Professor of Law, Southern California Law Center (Feb. 26, 1991).

<sup>30</sup> West, *supra* note 1, at 101 ("Nancy Cruzan has no values, preferences, or wishes, idiosyncratic or otherwise, to be respected."); *id.* at 99 ("The morally intolerable strain on . . . societal resources is occasioned not by the will to die, but by the *maintenance* of vegetative life against the desires and interests of all parties.") (emphasis in original); see also *id.* at 98 (noting that technology alters concepts of life and death—but only for those who cannot afford life-prolonging medical treatments).

<sup>31</sup> *Id.* at 93-98 (arguing that the first amendment should protect meaningful,

West, even though a citizen has a *right* to speak, the message of that speech is still subject to societal scrutiny because some messages are so antisocial that they should not be spoken.<sup>32</sup> Will this approach single out a Madison Avenue advertising firm that is trying to sell large, gas-guzzling cars, or will it scrutinize the flag-burner or ghetto resident who shakes a fist and shouts "Pigs, out!" at a passing patrol car? The irresponsible label will be reserved for speech that makes us uncomfortable, or that violates majoritarian values and standards. This is not a serious a problem for Vaclav Havel's Czechoslovakia, whose relatively homogenous population is united by a common history.<sup>33</sup> In ours, I will argue, it is.

### B. Reason Number Two: *Withdrawal of Support*

The call for responsibility is also likely to be coupled with a withdrawal of support from those found irresponsible. For Vaclav Havel, responsibility was an intensely personal notion.<sup>34</sup> In our society, however, group harms and redress play large roles. Unlike Czechoslovakia, our nation has inflicted monstrous harms on Blacks, Native Americans, Asians, and Chicanos.<sup>35</sup> West's call for responsibility, as I have pointed out, will be directed disproportionately at just these groups. Because these groups will have difficulty

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responsible, and truthful communication as opposed to insulated, individualistic acts of expression).

<sup>32</sup> West, *supra* note 1, at 95 (arguing that the "moral authority of the Constitution is thrown into doubt" by protecting scathing speech). A speaker's motives come into play in certain situations under current law. See, e.g., *New York Times v. Sullivan*, 376 U.S. 254 (1964) (holding that a public official may not recover damages for libel absent proof of malice by defendant); *New York v. Sullivan*, 889 F.2d 401 (2d Cir. 1989), *aff'd sub nom.* *Rust v. Sullivan*, 111 S. Ct. 1759 (1991) (upholding a ban on abortion counseling in federally funded clinics). West's suggestion, however, potentially opens up a broader range of speech to motive-based examination.

<sup>33</sup> See *infra* text accompanying notes 98-99. This homogeneity is not necessarily to Czechoslovakia's credit. Czechoslovakia transformed its population, of which more than one-third was ethnic groups prior to World War II, to a homogeneous one after the war. It did so by deporting Germans, by participating in an exchange of populations with Hungary, by ceding Ruthania—which had a Ukrainian population—to the USSR, and by failing to classify Gypsies as an ethnic group. 16 *NEW ENCYCLOPEDIA BRITANNICA* 910 (1991).

<sup>34</sup> West, *supra* note 1, at 65-66 (arguing that the struggle for a genuinely liberal society takes place not in the abstract projects for an ideal political or economic order, but instead focuses on the concrete needs of the individual); *id.* at 95-96 (stating that every citizen must decide whether to become a morally responsible individual).

<sup>35</sup> See D. BELL, JR., *RACE, RACISM AND AMERICAN LAW* (2d ed. 1980); R. WILLIAMS, *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT* (1990); Delgado, *Derrick Bell and the Ideology of Law Reform: Will We Ever Be Saved?*, 97 *YALE L.J.* 923, 935-42 (1988).

responding to this call for responsibility, we will enable ourselves to avoid neatly our own role in their subjugation.<sup>36</sup>

The admonition to "be responsible" shifts the onus of change to those at whom the call is aimed. If we continue to reduce services such as birth control, abortion,<sup>37</sup> prenatal and well-baby care, however, we will reduce rather than increase the capacity of poor women of color to take control of their own lives.<sup>38</sup> Moreover, if we can conveniently be rid of sixty-year-old black men, dying of the effects of lifelong hypertension,<sup>39</sup> then we can justify withholding expensive treatment from them while they are alive and functional. The call for responsibility will likely atomize and absolve us of any sense of collective obligation and fault by focusing on individuals, even though many of our social pathologies have a group dimension.<sup>40</sup>

### C. Reason Number Three: Paternalism and the Revival of Settlement House Mentality

West's proposal has more than a whiff of the condescension and genteel racism of the Settlement House Movement.<sup>41</sup> It harkens back to the early years of this century, when patrician white women of the Movement volunteered to work with the big-city poor, particularly with recent immigrants of

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<sup>36</sup> See *supra* text accompanying notes 14-33.

<sup>37</sup> *Rust v. Sullivan*, 111 S. Ct. 1759 (1991) (upholding ban on abortion counseling in federally funded clinics); R. BROOKS, *supra* note 27, at 111-12 (stating that a lack of sexual education and access to contraceptives is a factor in some teen pregnancies among African Americans, and that pregnant teenagers are far less likely than other expectant mothers to receive prenatal care).

<sup>38</sup> See R. BROOKS, *supra* note 27 (proposing self-help and governmental aid to poor people of color to enable them to attain greater social and economic stability).

<sup>39</sup> Black men have a higher incidence of serious hypertension than others, which some scientists attribute to the frustrations and assaults of living in a racist world. Goleman, *Anger over Racism Is Seen as a Cause of Blacks' High Blood Pressure*, N.Y. Times, Apr. 24, 1990, at C3, col. 1.

<sup>40</sup> Compare Delgado, *supra* note 14, at 947-52 (discussing the high degree of dependence that normative arguments and conclusions have on context) with West, *supra* note 1, at 44, 68 (decrying promiscuity and consumerism among society's "irresponsible") and *id.* at 71-72 (arguing that the current rights-based regime inhibits empathy and fellow-feeling). But see Williams, *Alchemical Notes, Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987) (arguing the contrary, that rights embolden and enhance the dignity of persons of color).

<sup>41</sup> See H. KRAUSS, *THE SETTLEMENT HOUSE MOVEMENT IN NEW YORK CITY, 1886-1914* (1981) (studying the New York City Settlement House Movement and its impact on the community); *HANDBOOK OF SETTLEMENTS* (R. Woods & A. Kennedy eds. 1970) (detailing the education that the settlement houses gave to their members); see also H. KARGER, *THE SENTINELS OF ORDER: A STUDY OF SOCIAL CONTROL & THE MINNEAPOLIS SETTLEMENT HOUSE MOVEMENT, 1915-1950* (1987) (citing a case study of social control exerted by a branch of voluntary private social service).



color.<sup>42</sup> These women taught the immigrants American standards of cleanliness and child care; how Americans ate, dressed, and behaved in public. They also taught them the language that Americans used: English.<sup>43</sup>

West's call for responsibility resembles the Settlement House Movement because it imposes majoritarian values on minority subcultures in a particularly patronizing and demeaning way.<sup>44</sup> It would privilege straight, middle-class, highly educated persons; it would call for the poor to give up casual sex and sharp-edged speech;<sup>45</sup> it would enjoin protesters to think twice before burning an American flag.<sup>46</sup> West may think of her proposal as a strategic retreat for liberals, but I think her prescription for our times entirely misreads our predicament, as well as the way out of it.<sup>47</sup>

One might argue that certain features of particular subcultures do indeed invite reform. For example, black men often do not remain with their families; Chicano youth often join gangs, part of whose program is antisocial; and some Latino men are said to demonstrate their manhood and social status by indiscriminate fathering of children. The problem with West's suggestion, however, is that increased responsibility will likely focus *only* on those groups and their transgressions. It will not examine the equally or perhaps more serious flaws of defense contractors, corporate raiders, polluters, and wealthy taxpayers who avoid a fair share of their taxes.

Given this likely inequity, why should the poor and members of outgroups care about being responsible? Certainly, they would not strive to be responsible to a system that denies them equity and dignity, and that consistently labels them outcasts. From whence would come their motivation? Responsibility would simply give powerful elites further license to condemn those they disfavor. Equally disconcerting is the possibility that a few members of the disadvantaged group might internalize the new message and begin to blame themselves for current conditions, thereby relaxing pressure for necessary social reform.

#### D. Reason Number Four: Scapegoating

As I have argued, West's call for responsibility is likely to focus on society's mavericks and minorities. It is likely to result in the withdrawal of material support, overlook the more pernicious behavior of well-heeled cor-

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<sup>42</sup> See J. ADDAMS, *TWENTY YEARS AT HULL-HOUSE* (Macmillan 1910) (discussing the targets of the Settlement House Movement); *HANDBOOK OF SETTLEMENTS*, *supra* note 41 (cataloguing the settlement houses that existed in the early twentieth century).

<sup>43</sup> The present-day "English only" movement seems to draw on many of the same attitudes of the earlier Settlement House Movement.

<sup>44</sup> See, e.g., West, *supra* note 1, at 93 (urging indoctrination and re-education of criminals under the banner of reviving the rehabilitative ideal).

<sup>45</sup> See *supra* text accompanying notes 24-27, 31-32.

<sup>46</sup> West, *supra* note 1, at 93-96 (discussing *United States v. Eichman*, 110 S. Ct. 2404 (1990)).

<sup>47</sup> Concerning the way out, see discussion *infra* part III.

porate types, and atomize and diffuse group blame and responsibility. In an ironic reversal of Harry Kalven's thesis,<sup>48</sup> Blacks and others will be blamed for the current retrenchment of civil liberties and for liberals' angst at seeing the obliteration of many of the Warren Court's gains. Kalven wrote that many beneficial reforms were born of the cauldron of racial justice; societal evils that afflicted Blacks stood out even more glaringly in the light of racial bigotry and animus.<sup>49</sup> Once in place, reforms such as procedural due process for school children<sup>50</sup> and protection for unpopular picketers<sup>51</sup> and lunch-counter demonstrators,<sup>52</sup> benefited everyone, not just Blacks.

West's call illustrates a melancholy corollary to Kalven's thesis: when things get tough, liberals will abandon support for populations of color to preserve their own comfort and security. The practices and "irresponsibilities" of outgroups will be portrayed as the source of our troubles. We will beseech them—gently or not so gently—to change so as not to elicit further wrath from the gods of the Supreme Court. "Behave!" we will say, "(Like us)."<sup>53</sup>

## II. THE SOURCE OF THE TROUBLE: EXPLAINING ROBIN WEST'S LURCH TO THE RIGHT

Despite the problems that I have pointed out, West undoubtedly thinks that her proposal is harmless, if not beneficial, to the poor and outgroups. How can she think this? There are a number of possibilities.

As a feminist, West may have extended care-and-connection themes, characteristic of a certain strand of feminism,<sup>54</sup> to areas where they do not work well. These themes call for an increase in the communal bond—"let's love each other more." In this respect, West imagines that if individuals take

<sup>48</sup> H. KALVEN, JR., *THE NEGRO AND THE FIRST AMENDMENT* (1965) (arguing that the civil rights movement had a profound impact on first amendment theory).

<sup>49</sup> *Id.* (stressing the general theme that the civil rights and civil liberties movements were intertwined).

<sup>50</sup> *E.g.*, *Goss v. Lopez*, 419 U.S. 565 (1975) (holding that suspending children from school without a hearing is a violation of procedural due process).

<sup>51</sup> *Edwards v. South Carolina*, 372 U.S. 229 (1963) (holding that a conviction for disturbing the peace while picketing violated first amendment rights).

<sup>52</sup> *Garner v. Louisiana*, 368 U.S. 157 (1961) (holding that evidence of disturbing the peace while sitting at a lunch counter was so vague, indefinite, and uncertain, that prosecution violated due process). See generally H. KALVEN, JR., *supra* note 48, at 140-45 (discussing convictions for disturbing the peace and their effects on civil liberties).

<sup>53</sup> For the view that the majority race has offered up Blacks as burnt offerings in our quest for equality and freedom, see D. BELL, JR., *supra* note 35, at 1-71 (taking an historical look at racial remedies); Bell, *Bakke, Minority Admissions and the Price of Racial Remedies*, 67 CALIF. L. REV. 3 (1979) (arguing that racial remedies are modest advances for blacks, not exceeding the benefits gained by whites).

<sup>54</sup> See C. GILLIGAN, *IN A DIFFERENT VOICE* (1982) (studies of connections between oneself and others based on a rights and responsibility theory); West, *supra* note 1, at 84-85 (echoing this view).

responsibility for their actions and for the actions of those around them, community acceptance and protection of rights will be strengthened.

A little love never hurt, but our problems run much deeper than that. People of color and the poor do not suffer from a lack of *love*, but from an unremitting institutional subordination that has ranged broadly across several centuries into areas of education, jobs, and housing.<sup>55</sup> West's article is not the work of an "organic intellectual," in Gramsci's sense,<sup>56</sup> because it is not rooted in the experience of oppressed peoples. It lacks both grounding in history and contemporary experience with class and color-based oppression. How else can we explain her proposal that society scrutinize the decision of a young, unwed, black, pregnant woman to determine if her wish for an abortion is "considered" or "responsible"?

A second possibility is that West, like many legal scholars, has fallen into the normative habit and now cannot conceive of a non-normative alternative such as direct action.<sup>57</sup> The Supreme Court today tends to decide on straight precedential grounds, and writes many opinions that have remarkably little normative quality. Opinions that hint at normative reasoning are decided on the basis of values such as efficiency and original intent, values that West and other liberals do not share.<sup>58</sup> Worse, the Court seems utterly indifferent to the types of appeals that succeeded with the Warren Court—to humanity, compassion, mercy, equality, generosity, and so on.<sup>59</sup>

West, and other liberals distressed by the Court's slant, could have responded by choosing among many non-normative alternatives, a few of which are discussed in the final section of this Essay. Once in the normative habit, however, one searches for a normative solution.<sup>60</sup> Faced with a Supreme Court that will not listen to impassioned normative pleas, liberals have chosen to try their normative message on the poor: "They'll listen—they'd better! And, while we're at it, we'll try each other. We'll listen too because we know we are already responsible; for us the start-up costs of the new responsibility regime are negligible, requiring few changes in our own behavior."

A third possible explanation for West's mistake is optimism. White liber-

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<sup>55</sup> See sources cited *supra* notes 21, 23, 27.

<sup>56</sup> Attributed to Antonio Gramsci, the term refers to one who places his or her intellect at the service of the people, proposes theories and action programs rooted in their experience, and regards the people as the source of his or her inspiration and authority.

<sup>57</sup> On the normative habit (and how to break it), see Delgado, *supra* note 14, at 959.

<sup>58</sup> West, *supra* note 1, at 43 (criticizing Court decisions on the grounds that individual freedom lost ground to state control).

<sup>59</sup> Schlag, *supra* note 11, at 168 (stating that postmodern ideas have conquered normative ones).

<sup>60</sup> Delgado, *supra* note 14, at 959-60 (suggesting an exchange of abstraction of ethical discourse for deductive reasoning); Schlag, *supra* note 11, at 176, 189-90 (discussing the fall of normativity).

als, like West, are notably more sanguine than people of color over prospects for racial reform.<sup>61</sup> Whites believe things will get better: if we do nothing (because the gap between Blacks and Whites is already closing, if not closed),<sup>62</sup> if we just talk together; if we show compassion and concern. Blacks and others know better.<sup>63</sup> The reasons for this difference in outlook—pessimistic Blacks, optimistic Whites—are complex, involving self-blame on the one hand, and racial guilt on the other.<sup>64</sup>

West's overly quick embrace of a neo-communitarian solution reveals characteristic majoritarian optimism. Talking together about responsibility and shared goals may yield consensus, but that consensus may just as easily prove to be coercive, based on a misleading agreement.<sup>65</sup> The mixed-race group talks, probably endlessly, about responsibility, community, and the means of preserving liberty in a conservative era. But shared understandings, themselves shaped by racism and class domination, will affect what is discussed, whose behavior is examined, and how "responsibility" is framed.<sup>66</sup> At some point during the conversation, the less empowered conversants will fall silent. "Now we are getting somewhere," the more empowered conversants will declare (a reaction I predict will greet West's article itself from her fellow liberal readers, but from few of color).<sup>67</sup>

A final explanation for West's having landed on such treacherous ground

<sup>61</sup> On this remarkable difference, see Delgado, *supra* note 35, at 929-34 (setting forth a dialogue between a doctor and patient regarding the pessimistic view that Blacks have about racial reforms and why). *But see* West, *supra* note 1, at 75 (stating Havel's optimistic argument that genuine democracy can be sustained when leaders are held personally responsible).

<sup>62</sup> Delgado, *supra* note 35, at 932-34 (discussing the white view of black social progress).

<sup>63</sup> *Id.* at 932-34 (discussing political action as a vehicle for social change).

<sup>64</sup> *Id.* at 928-34, 937, 945-47 (discussing the origins of the different outlooks of black and white individuals).

<sup>65</sup> See Delgado, *Critical Legal Studies and the Realities of Race*, 23 HARV. C.R.-C.L. L. REV. 407, 409-13 (1988) (describing the differing racial views of community and structure); Delgado, *ADR and the Dispossessed* (Book Review), 13 LAW & SOC. INQUIRY 145, 152-54 (1988) (describing the likelihood of prejudicial results when minorities enter into alternative dispute resolution); see also Delgado, *Brewer's Plea: Critical Thoughts on Common Cause*, 44 VAND. L. REV. 1 (1991) (describing the lack of common basis for discussion between critical race scholars and mainstream liberals).

<sup>66</sup> See Note, *Race and Racism in the University*, 76 VA. L. REV. 295 (1990) (authored by Darryl Brown) (describing the community's role in deciding which actions are considered "racist").

<sup>67</sup> West may be speaking of very small cells and groups, where dialogue would not be subject to these pitfalls. White society, however, has never been comfortable with Blacks or other ethnic groups forming small same-race groups. Black theme houses, dorms, and cafeterias always generate fear and resentment among white students. See Delgado et al., *Can Science Be Inopportune? Constitutional Validity of Governmental Restrictions on Race-I.Q. Research*, 31 UCLA L. REV. 128, 195 n.404 (1983) (describing a racial incident at a black students' dormitory at Cornell University); Lawrence, *If He Hollers*

is essentialism.<sup>68</sup> Her new concept of responsibility is notably more unitary, judgmental, and essentialist even than rights. We must be responsible, Havel says, echoed by West, to “the world”<sup>69</sup>—but to whose world? Our society’s concept of the world is fragmented.<sup>70</sup> To which world are we to be responsible? And what do we do when responsibility to one world (say, our religion) conflicts with responsibility to another (say, our ethnic group)? There are many worlds, not one universalizing, totalizing, essentialized world. Groups have different experiences and different histories, and have been advantaged or disadvantaged in radically different ways. To urge responsible behavior as though that were an easily understood notion, capable of universal application, is simply to misconceive the complexity of our (particularly the minority) experience.

Havel urged that individuals “live in truth.”<sup>71</sup> An inspiring idea, but whose truth does he mean?<sup>72</sup> Who decides whether the ghetto male who shakes a fist at the passing police car has spoken and lived “in truth” or is simply a budding criminal?<sup>73</sup> West might reply that living in truth means only taking each other seriously, struggling together to reach a consensual truth richer than that with which we began.<sup>74</sup> This view, however, is still subject to the pitfalls of consensus-reaching among conversants of radically different degrees of power and status. It is also likely to run up against unbridgeable gaps, particularly in times like ours, when society is increas-

*Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 433 (1990) (describing a racial incident at a black students’ dormitory at Stanford University).

<sup>68</sup> See Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 602-05 (1990) (describing West’s view of essentialism).

<sup>69</sup> West, *supra* note 1, at 66, 72 (quoting Havel).

<sup>70</sup> Winter, *Contingency and Community in Practice*, 143 U. PA. L. REV. 963 (1991) (stating that “community” is a cognitive phenomenon).

<sup>71</sup> West, *supra* note 1, at 67-69 (quoting Havel).

<sup>72</sup> On the multiplicity of truth in our postmodern world, see generally P. BERGER & T. LUCKMAN, *THE SOCIAL CONSTRUCTION OF REALITY* (1967); N. GOODMAN, *WAYS OF WORLDMAKING* (1978); L. HUTCHEON, *A POETICS OF POSTMODERNISM: ESSAYS ON THE POETICS AND RHETORIC AND LAW* (1985); Lyotard, *Answering the Question: What Is Postmodernism?*, in *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* 71 (G. Bennington & B. Massumi trans. 1984).

<sup>73</sup> See Kairys, *Freedom of Speech*, in *THE POLITICS OF LAW* 237, 259-66 (D. Kairys 2d ed. 1990) (describing the conflict between the modern ideology and the reality of free speech).

<sup>74</sup> See West, *supra* note 1, at 70-71 (quoting Havel: “A world where ‘truth’ flourishes not in a dialectic climate of genuine knowledge, but in a climate of power motives, is a world of mental sterility, petrified dogmas, rigid and unchangeable creeds leading inevitably to creedless despotism.”); *id.* at 95-96 (“What is honored and hence protected [when a postdemocratic society protects dissent] is not the isolated, individualistic act of expression, but the social, critical, and above all cultural act of morally responsible communication.” (emphasis in original)); *id.* at 104 (stating that familiarity with Native American Church customs will breed greater desire to maintain them); *id.* at 106 (urging liberals to educate themselves culturally and politically).

ingly polarized. One person, on seeing a starving beggar, may react with loathing—"why doesn't that man get a job?" Another may respond with sympathy, having been poor herself.<sup>75</sup> If persons perceive the world differently and attach different meanings to the same experiences, then living in truth is simply a prescription for solipsism.<sup>76</sup> This may be acceptable in a nation like Havel's Czechoslovakia, struggling to free itself from stifling conformity and the statist excesses of previous regimes, but our society needs something different.

### III. IF NOT RESPONSIBILITY, THEN WHAT? ON CHOOSING THE WRONG CZECH

West's recent embrace of responsibility over rights is predictable, appealing—and wrong. As I have shown, it is ahistorical—not grounded in the experience of the oppressed—and paternalistic, and will likely be coupled with withdrawal of desperately needed material support. It looks to a repressive dialogue to set its terms, judges responsibility by middle-class norms, condemns the behaviors and practices of outgroups only, and revives the genteel racism and paternalism of the Settlement House Movement. The only good thing that can be said about West's proposal is that it may, for a little while, appease the conservatives on the Supreme Court.

Is there a better course of action? There is, but we must turn to different sources to find it. Our own political tradition contains many candidates whom West might have chosen as models,<sup>77</sup> but if she desired to look abroad for fresh sources, she might have looked to someone other than Vaclav Havel, to a different Czech, one who was writing with times more like ours in mind.

Novelist Milan Kundera, author of *The Unbearable Lightness of Being*<sup>78</sup> and other works,<sup>79</sup> wrote about the era just before Havel came to power.<sup>80</sup>

<sup>75</sup> See Delgado, *supra* note 14, at 954, 956 (describing how normativity allows the majority to ignore suffering).

<sup>76</sup> *Id.* at 936 (stating that normative legal thought and discourse has a circular quality); see Schlag, *supra* note 11, at 180-81 (describing the tendency toward solipsism). But see West, *supra* note 1, at 104 (arguing that attention to other cultures and their problems will heighten empathy).

<sup>77</sup> E.g., M.L. KING, JR., *Letter from a Birmingham City Jail*, in A TESTAMENT OF HOPE (J.M. Washington ed. 1986); T. PAINE, *Common Sense*, in COMMON SENSE, AND OTHER POLITICAL WRITINGS (N. Adkins ed. 1953); H. THOREAU, *On Civil Disobedience*, in WALDEN, AND CIVIL DISOBEDIENCE (O. Thomas ed. 1966).

<sup>78</sup> M. KUNDERA, *THE UNBEARABLE LIGHTNESS OF BEING* (M. Heim trans. 1984).

<sup>79</sup> E.g., M. KUNDERA, *THE BOOK OF LAUGHTER AND FORGETTING* (M. Heim trans. 1986). For a more recent work, see M. KUNDERA, *IMMORTALITY* (1991), a rather less political work, not even set in Czechoslovakia.

<sup>80</sup> Milan Kundera was born in Brno in 1929, the son of a well-known concert pianist. He taught at the National Film School until 1969, when he lost his position in the unrest following the Russian invasion of Czechoslovakia. Because the authorities were making his life increasingly difficult, he left Czechoslovakia in 1975 for a position at the

This was a period when Czechs were struggling to overthrow their corrupt and totalitarian leadership and ultimately to install the more enlightened, post-Western regime of Havel. The Czech people engaged in secret and public insurrection, mass demonstrations, strikes, and street theatre.<sup>81</sup> Within this atmosphere of struggle against a totalitarian government, Kundera emphasized intense individualism.<sup>82</sup> In a world where "responsibility" was colored by the same actors demanding responsible action, his characters found paramount their responsibility to *themselves* and to the things they held dear.<sup>83</sup>

In *The Unbearable Lightness of Being*, the protagonist, Tomas, is torn between two women who represent opposite poles of his life<sup>84</sup>—Sabina, the artist, the mistress, the one who plays the same games by the same rules ("the unwritten contract of erotic friendship"<sup>85</sup>), and Tereza, his wife, who offers him undying and faithful, albeit jealous, love (in explicit violation of the rules of erotic friendship). Sabina is self-sufficient, and holds herself

University of Rennes in France. McEwan, *An Interview with Milan Kundera*, 11 GRANTA 21 (1984).

Kundera's first novel, *The Joke*, was published in Czechoslovakia in 1967 and created a major commotion during the "Prague Spring." The Czech communist party banned this, and other works by Kundera, from bookshops and libraries during the "normalization" period that followed the invasion. While in exile, he wrote *The Book of Laughter and Forgetting* and *The Unbearable Lightness of Being*, the works for which he is perhaps best known in the West. *Id.* at 21-22. These books, like *The Joke*, are concerned with the dangers of political dogmatizing, the abuses of power, the political control of the past, and the false lure of utopias. Kundera's wit hits its favorite target in heavy-handed government of any type. He finds political excesses absurd, antihuman, and darkly comical. His novels remorselessly debunk bureaucracy, "kitsch," and all forms of groupthink. *Id.* at 23-32.

<sup>81</sup> M. KUNDERA, *THE BOOK OF LAUGHTER AND FORGETTING*, *supra* note 79, at 3, 13-14; M. KUNDERA, *supra* note 78, at 25-27, 67.

<sup>82</sup> See Molesworth, *Kundera and The Book: The Unsaid and the Unsayable*, 73 SALMAGUNDI 65 (1987) (arguing that Kundera's idea of the unity of European identity is based on his belief in the sanctity of the individual and the paradoxical awareness that when individuals form groups they destroy individuality, and with it the source of all sanctity); see also M. KUNDERA, *THE BOOK OF LAUGHTER AND FORGETTING*, *supra* note 79, at 236-37.

<sup>83</sup> See M. KUNDERA, *supra* note 78, at 186 (describing a scene in which a man from Communist Party Ministry of the Interior urges Tomas, the protagonist, to sign a retraction of an article critical of the regime because it is an irresponsible article, but Tomas refuses and is forced to give up his job as a brain surgeon and become a window washer); cf. *id.* at 217-20 (explaining that Tomas's responsibility to himself and to his wife overrides his duty to the people as articulated by his friends in the resistance movement).

<sup>84</sup> *Id.* at 27-29 (depicting Tomas's inability to think of an excuse to tell Tereza in order to visit Sabina).

<sup>85</sup> *Id.* at 13 (explaining that the unwritten contract of erotic friendship stipulated that Tomas must exclude love from his life).

apart from her lovers as she holds herself apart from her country, watching its demise from afar, commenting on the "kitsch" of the intellectuals who try to redeem it. Tereza, who cannot exist apart from her relationship with Tomas and Czechoslovakia, returns to her country from her exile in Switzerland, and, because she feels that her return is weak, resigns to take her place with the weak (i.e., with the Czechs).

In the same way that he is torn between the two women, Tomas is torn between different forms of political action. After being asked by his resistance friends to sign a petition for the release of political prisoners, Tomas reframes the question to sign or not to sign: "Another way of formulating the question is, is it better to shout and thereby hasten the end, or to keep silent and gain thereby a slower death?"<sup>86</sup> Kundera maintains that we can never know. In the words of the German saying, *Einmal ist Keinmal* (once is never at all)—we can never go back and make the opposite decision in order to compare the two. We cannot choose Sabina and then Tereza to see which life we like better; we can never sign and then not sign. In the end, Tomas elects not to sign, out of a sense of individual rather than political responsibility.

Within the increasingly totalitarian atmosphere of a conservative Supreme Court, responsibility for *individual* action, arguably, must remain our focus as well. Responsibility in Kundera's interpretation of Havel is the unflinching recognition that "there is no unity between a man's character and his destiny, that the one is always victim of the other."<sup>87</sup> Destiny may sometimes demand the kind of compromise that West's vision of responsibility entails, but we must not lose ourselves in the mass. Above all, we must remember the existential predicament that Kundera's characters face, for it is ours as well. We cannot sacrifice rights to the notion of collective responsibility and then later undo that sacrifice.

Kundera's emphasis on individual integrity is again reflected by a character named Mirek from *The Book of Laughter and Forgetting*.<sup>88</sup> Mirek keeps an account of everything. He maintains a careful diary, keeps correspondence, and takes notes at meetings where there is a discussion of the current situation and debate of future plans.<sup>89</sup> His friends accuse him of being careless, but Mirek insists on his right to write and to have such things, arguing that it is protected by the constitution.<sup>90</sup> Later, Mirek begins to feel guilty for endangering himself and his friends, and decides to dispose of the incrim-

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<sup>86</sup> *Id.* at 222.

<sup>87</sup> Kundera, *A Life Like a Work of Art: Homage to Vaclav Havel*, NEW REPUBLIC, Jan. 29, 1990, at 16, 17.

<sup>88</sup> *Supra* note 79.

<sup>89</sup> *Id.* at 3-4.

<sup>90</sup> *Id.* at 4.



inating papers.<sup>91</sup> Just before Mirek is able to follow through with his plan, however, he is caught and sentenced to prison.<sup>92</sup>

Ironically, as soon as Mirek has decided to submit to the state and to allow it to dictate what he can and cannot say (symbolized by his decision to stop keeping the papers), the state completely deprives him of all of his rights (i.e., jails him). For Mirek, imprisonment is the best ending his life could have, because at least he suffers that fate for something in which he believes—the right to individual expression. While we are facing a hostile, conservative Supreme Court, we ought to see the wisdom in continuing to fight for what we believe. We should not give in to the majoritarian pressures because, as with Mirek, giving in will only hasten the death of progressive movements.

Kundera also emphasizes the importance of history. In *The Book of Laughter and Forgetting*, Kundera proclaims, “[T]he struggle of man against power is the struggle of memory against forgetting.”<sup>93</sup> The book’s heroine, Tamina, constantly struggles against forgetting her past. When she gives up her struggle in exchange for a place where she can “forget her forgetting” and feel no remorse for it,<sup>94</sup> she is taken to an island inhabited only by children who do not “allow the future to collapse under the burden of memory.”<sup>95</sup> It is the perfect place for Tamina to end her struggle. When Tamina ceases to look back, however, she cannot stand her life any longer and ends up drowning as the children, the symbol of having no past, watch her.<sup>96</sup>

Robin West, like Tamina, should not try to escape the past. If West had heeded the history of Native Americans, the poor, and Blacks, she might well have hesitated to call for responsibility. By ignoring our nation’s experience with oppression and calling for a shift from rights toward responsibilities, West endangers the cause of social justice. One must look back if one is to move forward; civil rights activists will never win the struggle against oppressive power if they ignore the sad narratives of the past.<sup>97</sup>

Other reasons counsel caution in embracing Havel, at least over other authors and approaches to protecting human dignity. Our society has not reached the stability that the Czechoslovakian nation has attained under Havel, and, possibly, it may never. The Czech nation was united.<sup>98</sup> Unlike

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 23-24.

<sup>93</sup> *Id.* at 3.

<sup>94</sup> *Id.* at 163-64.

<sup>95</sup> *Id.* at 187.

<sup>96</sup> *Id.* at 191, 234-35 (Afterword, interview with Phillip Roth).

<sup>97</sup> *E.g.*, Delgado, *supra* note 35, at 923-24 (citing Derrick Bell’s fictional dialogue); *id.* at 929-47 (explaining that the only way for minorities to move forward, when faced with history of failed civil rights reform, is to rewrite the Constitution).

<sup>98</sup> Kundera, *The Tragedy of Central Europe*, N.Y. Rev. Books, Apr. 26, 1984, at 33 (stating that almost the entire population of Czechoslovakia supported the revolution in the Prague Spring of 1968).

us, most sectors in Czechoslovakia disapproved of the totalitarian government and wanted reform. Most Czechs had a common memory—they remembered what they had been as a people before they were oppressed.<sup>99</sup> They were bonded through history, blood, religion, ethnicity, and a common oppression. Once the oppressive government was ready to fall, heeding Havel's call—"Care for each other!"—was easy, made sense.

The United States is different. Our poor and minorities do not belong yet.<sup>100</sup> Too many fences keep them out; their only fragile protection is the framework of judicially enforced rights that we have elaborately constructed over the last few decades.<sup>101</sup> The only guarantee that we have is of no more slavery. Our rights only protect us against the most vicious forms of debasement.<sup>102</sup> In the face of this, Professor West calls for consensus, for dialogue, and for responsibility. She misreads her times. The movement, in Eastern Europe and elsewhere, is all the other way—away from consensus, toward assertion of difference, of individual identity. She also misreads her own culture. We lack today the glue, the impetus, the background for a trust-based politics. Outsiders have more urgent concerns such as responsibilities for survival, and responsibilities to self, to neighborhood, and to clan. West's call for a universalizing, totalizing responsibility will leave us cold. If white progressives want to be helpful, they can desist from enjoining us to speak sweetly and step lightly in order to appease the sleeping gods on high. They can talk to us about insurrection, about income redistribution, about oppositional, destabilizing tactics that will force society to keep our concerns on the front burner.

We need responsibility, but of a kind quite different from that called for by West's Foreword. We do not need a graceful lecture on how to backpedal slowly in a conservative era. We need writers and fellow travelers willing to go out on a limb with us. Let us not talk about giving ground slowly, but about *retaking* it. This, to my way of thinking, is what responsibility means in times like ours.

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<sup>99</sup> *Id.* (discussing the importance of culture for the identity of the people, and highlighting the significance of memory in the revolt).

<sup>100</sup> If anything, our diffidence toward the poor has deepened in recent years. See Delgado, *On Taking Back Our Civil Rights Promises*, 1989 WIS. L. REV. 579 (describing how computers have made finding inequalities easier, but how limitations on civil rights actions have made equality more elusive); see also Delgado, *Inequality "From the Top": Applying an Ancient Prohibition to an Emerging Problem of Distributive Justice*, 32 UCLA L. REV. 100 (1984) (focusing on two different types of government-imposed inequality: a government's power to favor one group while ignoring another, and a government's power to impoverish the other group directly).

<sup>101</sup> Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301 (1987) (critiquing the Critical Legal Studies movement from a minority perspective).

<sup>102</sup> *Id.*; Williams, *supra* note 40.

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