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Rodrigo's Remonstrance: Love and Despair in an Age of Indifference - Should Humans Have Standing Book Review

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BOOK REVIEW

Rodrigo's Remonstrance: Love and Despair in an Age of Indifference—Should Humans Have Standing?

THE STATE OF BLACK AMERICA 1998. Edited by Lee A. Daniels. New York: National Urban League Publications Unit, 1998. Pp. 320. \$24.95.

THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS. By William G. Bowen & Derek Bok. Princeton: Princeton University Press, 1998. Pp. xxxvi, 472. \$24.95.

ENDING AFFIRMATIVE ACTION: THE CASE FOR COLORBLIND JUSTICE. By Terry Eastland. New York: Harper Collins, 1996. Pp. x, 229. \$23.00.

THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA. By Paul M. Barrett. New York: Dutton, 1999. Pp. viii, 296. \$23.95.

REVIEWED BY RICHARD DELGADO* AND NOAH MARKEWICH**

INTRODUCTION: IN WHICH RODRIGO AND I MEET IN AN UNLIKELY SETTING AND RESOLVE TO DISCUSS POSTDIVERSITY RACIAL REMEDIES

“Professor, is that you?”

The familiar voice from behind me gave me quite a start. Wheeling around so suddenly that my cart almost collided with that of an oncoming shopper, a young woman who smiled at me indulgently, I sputtered, “Rodrigo!¹ What are you doing here?”

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1. See Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L.J. 1357 (1992) (introducing our interlocutor and alter ego, Rodrigo). The son of an African-American serviceman and Italian mother, Rodrigo was born in the United States but raised in Italy when his father was assigned to a U.S. outpost there. See *id.* at 1359. Rodrigo graduated from the base high school, then attended an Italian university and law school on government scholarships, graduating second in his law class. See *id.* When the reader meets him, he has returned to the United States to investigate graduate law school (L.L.M.) programs. See *id.* At the suggestion of his sister, veteran U.S. civil rights lawyer Geneva Crenshaw, see DERRICK A. BELL, *AND WE ARE NOT SAVED* (1992), he seeks out “the Professor” for advice. Despite their age difference, the two become good friends, discussing affirmative action and the decline of the West, see Delgado, *supra*; law and economics, see Richard Delgado, *Rodrigo's Second Chronicle: The Economics and Politics of Race*, 91 MICH. L. REV. 1183 (1993); love, see Richard Delgado, *Rodrigo's Third Chronicle: Care, Competition, and the Redemptive Tragedy of Race*, 81 CAL. L. REV. 387 (1993); legal rules, see Richard Delgado, *Rodrigo's Fourth Chronicle: Neutrality and Stasis in Antidiscrimination*

The tall, smiling youth stepped out from behind his cart, shook my hand warmly, and said, "Giannina and I are in town for a few days, staying with her mother, who has a time-share condo here. She uses it every summer to get away from the Florida heat.² The two of them are making plans for when the baby comes, then in about a week we're heading for Mexico for a few days' vacation. We tried calling you, but the school says your voice mail has been down."³

"I never much cared for the new technology," I said, then motioned toward his supermarket basket, which was piled high. "Looks like you're stocking up."

"Giannina's mom has to start over every time she comes to town, because the previous tenants are required to clean everything out. She gave me quite a shopping list."

"I've got a long one myself," I said, easing my basket along the aisle and motioning him to follow. "What a nice surprise. We must get together before the two of you take off."

"Giannina made me promise to set something up. I was going to drop by

Law, 45 STAN. L. REV. 1133 (1993); the critique of normativity, see Richard Delgado, *Rodrigo's Fifth Chronicle: Civitas, Civil Wrongs, and the Politics of Denial*, 45 STAN. L. REV. 1581 (1993); relations between men and women of color, see Richard Delgado, *Rodrigo's Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639 (1993); enlightenment political theory, see Richard Delgado, *Rodrigo's Seventh Chronicle: Race, Democracy, and the State*, 41 UCLA L. REV. 721 (1994); black crime, see Richard Delgado, *Rodrigo's Eighth Chronicle: Black Crime, White Fears—On the Social Construction of Threat*, 80 VA. L. REV. 503 (1994); narrative jurisprudence, see Richard Delgado, *Rodrigo's Final Chronicle: Cultural Power, the Law Reviews, and the Attack on Narrative Jurisprudence*, 68 S. CAL. L. REV. 545 (1995) (final chronicle in first cycle and final chapter of RICHARD DELGADO, *THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE* (1995)); the rule of law, see Richard Delgado, *Rodrigo's Ninth Chronicle: Race, Legal Instrumentalism, and the Rule of Law*, 143 U. PA. L. REV. 379 (1994); affirmative action, see Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711 (1995); clinical theory, see Richard Delgado, *Rodrigo's Eleventh Chronicle: Empathy and False Empathy*, 84 CAL. L. REV. 61 (1996); the problem of desperately poor border settlements, see Richard Delgado, *Rodrigo's Twelfth Chronicle: The Problem of the Shanty*, 85 GEO. L.J. 667 (1997); formalism, see Richard Delgado, *Rodrigo's Thirteenth Chronicle: Legal Formalism*, 95 MICH. L. REV. 1105 (1997); the recent right-wing surge, see Richard Delgado, *Rodrigo's Fourteenth Chronicle: American Apocalypse*, 32 HARV. C.R.-C.L. L. REV. 275 (1997); racial mixture and assimilation, see Richard Delgado, *Rodrigo's Fifteenth Chronicle: Latino Critical Scholarship and the Black-White Binary*, 75 TEX. L. REV. 1181 (1997); alternative dispute resolution, see Richard Delgado, *Conflict as Pathology: An Essay for Trina Grillo*, 81 MINN. L. REV. 1391 (1997) (unnumbered tribute to the late Professor Grillo); the marketplace as a cure for racism, see Richard Delgado, *Rodrigo's Roadmap: Is the Marketplace Theory for Eradicating Discrimination a Blind Alley?*, 93 NW. U. L. REV. 215 (1998); and the fate of equality, see Richard Delgado, *Rodrigo's Bookbag: Brimelow, Bork, Murray, and D'Souza—Recent Conservative Thought and the End of Equality*, 50 STAN. L. REV. 1929 (1998) over the next five years. During this period, the brash, talented Rodrigo earns his L.L.M. degree and embarks on his first teaching position. The Professor meets Rodrigo's friend and soulmate, Giannina, and learns that Rodrigo's family immigrated to America via the Caribbean. His father Lorenzo looks black and identifies as such, but speaks perfect Spanish.

2. See Delgado, *Rodrigo's Sixth Chronicle*, *supra* note 1, at 674 (introducing Giannina, Rodrigo's life companion and soulmate). A published poet and playwright, see Delgado, *Rodrigo's Third Chronicle*, *supra* note 1, at 402; Delgado, *Rodrigo's Fourth Chronicle*, *supra* note 1, at 1137, Giannina recently decided to enroll in law school. See Delgado, *Rodrigo's Thirteenth Chronicle*, *supra* note 1, at 1108.

3. "The Professor," like Rodrigo, is a fictional character, a composite of many individuals and not to be identified with any single person. As he is constructed here, the Professor is a man of color teaching civil rights law at a major institution and in the late stages of his career.

your office on the way home. Mrs. Pellegrini said we should invite you over for tea. She's interested in meeting you. Oh, here are the anchovies." Rodrigo took a large tin and added it to his already overflowing basket.

"I'd be honored," I said. "How is Giannina doing these days?"

"Fine, except that she has these strange cravings. Just the other day, she wanted a peanut butter sandwich with anchovies on the side."

I smiled, remembering the time, many years ago, when my late wife had been pregnant with my own two daughters. "And what is her mom like?"

"You'll like her," Rodrigo said. "She's an ardent environmentalist. In fact, she's at a meeting of the local wildlife federation right now."

"Then I know just the present for her," I said, reaching for a long, narrow box of transparent sandwich wrap that I used to pack my lunches for work. Then, after a pause to allow a pair of fast-moving teenagers with baskets speeding down the aisle to clear us, I said, "And what are you working on these days?"

"Oh," replied Rodrigo, frowning and peering closely at two pricing labels for almost identical-looking packages of crackers. "Let's see, this one looks like it's . . . twenty-four cents an ounce, while this other one . . . okay, I'll take this one . . . oh, what am I working on. Well, I've got my vacation reading right out in the car, as a matter of fact—four books on the current racial situation. An advance copy of the National Urban League's *State of Black America 1998*,⁴ Terry Eastland's diatribe against affirmative action,⁵ Bowen and Bok's *The Shape of the River*,⁶ and *The Good Black*."⁷

"That's quite an assortment," I said, slowing down to round the corner of the aisle and head down the next. "What made you select those four?"

"Just keeping up on my reading." Rodrigo paused a moment at the meat counter to scrutinize some pink-looking filets of salmon. "Mmmm. Those look good. Giannina and her mother love salmon. But, as I was saying, after reading three of them and nearly finishing the fourth, a hypothesis occurred to me. I was just starting to talk it over with Giannina when an old friend stopped by to drop off a baby present, so we had to put it on hold. Maybe we can discuss it when you come for tea."

"Sounds good to me," I said. "I've read Eastland, which struck me as a particularly remorseless dissection of affirmative action, as cold and uncaring as I've seen. And of course I've read Bowen and Bok, which everybody has been talking about—even the tables and charts. I asked the librarian to get me *The Good Black* the other day. But I haven't seen the latest from The Urban League."

"I can lend it to you when we get outside," Rodrigo said, fishing his credit card out of his wallet and holding it in his teeth as he slid a heavy bottle of

4. THE STATE OF BLACK AMERICA 1998 (Lee A. Daniels ed., National Urban League 1998) [hereinafter NATIONAL URBAN LEAGUE].

5. TERRY EASTLAND, ENDING AFFIRMATIVE ACTION: THE CASE FOR COLORBLIND JUSTICE (1996).

6. WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (1998).

7. PAUL M. BARRETT, THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA (1999).

water onto the lower shelf of his shopping cart. "Giannina's mom drinks only the bottled kind. She said we would too, if we saw *A Civil Action*.⁸ Oh good, there's not much of a line."

As we waited for the checker to finish ringing up the purchases of the shopper ahead of us, I asked Rodrigo, "Where in Mexico are the two of you going?"

"A little fishing village in Baja California," Rodrigo replied. "One of my colleagues told me about it. It's not too touristy, and the prices are lower than in the big resorts. We decided to go before Giannina gets too uncomfortable to travel."⁹

"Send me a postcard," I said. "I'll be down there myself on my semester off. But that won't be 'til a few months later. I'm afraid we won't cross paths."

Rodrigo paused as our cashier rang up the final items and handed him the bill. He examined it quickly, then handed the cashier his credit card. "My mother-in-law said to give you these coupons," he said.

Minutes later, we were wheeling our baskets through the supermarket's huge parking lot. "Hey, you parked practically next to me," Rodrigo said. He opened the hatchback of his and Giannina's little car, and I helped him stow his groceries inside.

"Thanks," Rodrigo said, opening up the back passenger-side door and reaching inside. "Here's the National Urban League book. Now, let me help you with your stuff."

He did, and after exchanging phone numbers and promising to get together soon, we drove off to our respective destinations. Rodrigo was true to his word. When I returned to my apartment, I heard Giannina's familiar voice on my answering machine inviting me to her mom's place the following Thursday for tea, and thanking me for making sure that Rodrigo got all the food items she wanted—especially the anchovies.

I. IN WHICH RODRIGO, GIANNINA, MRS. PELLEGRINI, AND I DISCUSS FOUR BOOKS DEALING WITH AMERICA'S RACIAL PREDICAMENT

"Good afternoon," I said. "Are you Mrs. Pellegrini?"

The handsome, white-haired woman standing at the doorway took my hand, smiled warmly, and invited me inside. "You must be the Professor. Welcome. Giannina has told me so much about you. It looks like you brought something."

"It's for you," I said, handing over a package I had wrapped myself. "Open it now, if you like."

While ushering me into the attractive, sunlit condominium, Mrs. Pellegrini tilted her head and looked at my rectangular, flat package with interest. "It must be a stuffed animal," she joked.

As she began removing the wrapping paper, I said, "I hope you don't already have one. Rodrigo told me you're an environmentalist."

8. *A CIVIL ACTION* (Touchstone Pictures 1998).

9. See RICHARD DELGADO, *WHEN EQUALITY ENDS: STORIES ABOUT RACE AND RESISTANCE* 223–43 (1999) (describing Rodrigo and Giannina's disastrous trip).

"Oh, an animal clock!" she exclaimed, clapping her hands together. "A friend of mine has the bird kind that plays songs every hour on the hour. I've always wanted one like this." Looking at it closely, she said, "I've got the perfect place for it." As she picked it up and motioned me to follow her in the direction of the kitchen, I heard the sound of familiar voices and noted to myself the resemblance between mother and daughter.

An attractive woman—maybe after the young ones head off to Mexico, I'll ask her to lunch. I hope Giannina won't be scandalized, I thought, and cautioned myself not to be too forward. Perhaps a sedate invitation to a lecture at my university, followed by a bite to eat at a campus restaurant. Surely the young people could not object; she is, after all, about the age my late wife would have been had she lived. And I *had* been wanting to learn more about environmentalism, especially the new environmental justice movement. But I warned myself to proceed discreetly, remembering how the young often did not like to think of their elders as having any sort of social life and not wanting to jeopardize the fine relationship I enjoyed with Rodrigo and Giannina.

"Oh, there you are," Giannina said, looking up from some two-person cooking project with which she and Rodrigo were busily engaged. "We hope you like Italian soup. We're making it for later, in case we get hungry after tea and cookies. What do you have there, Mom?"

Mrs. Pellegrini showed the two young people her present, which brought much laughter and exclamations as she plugged it in and turned the hands to the various animal positions.

"There's a way to turn it off at night, if you want," I said. "The instructions are in that plastic bag over there. The warranty, too."

Rodrigo covered the large pot, adjusted the range to low simmer, and took off his white chef's apron. "Come on out," he said. "Everything's ready."

We followed Giannina as she carried the tea and cookies on a tray to the dining area adjacent to the kitchen and placed them down on the table, which I noticed was nicely set. A far cry from my bachelor simplicity, I thought, then looked up again at Mrs. Pellegrini, who was adjusting a spray of yellow flowers in a glass bowl on the table.

"Have a seat, Professor. Why don't you sit over here next to me? That way, we can keep an eye on the young people and make sure they don't get into trouble."

I laughed and pulled the chair out for her. She smiled, thanked me, then said, "I know Rodrigo and Giannina have been waiting all week to talk to you about some books they've been reading. Go ahead and don't worry about me. I taught at the community college before I retired, including classes in government and U.S. history. I know next to nothing about law, but I'm willing to make the effort."

Rodrigo thanked her and immediately got up and brought four familiar-looking books from the hutch nearby and set them next to him on the table. They were the same four he and I had discussed in the supermarket the other afternoon.

"May I offer you a refill, Professor, before my son-in-law gets started?" Mrs. Pellegrini asked. "By the way, you can call me Teresa."

As Rodrigo looked up expectantly, I took the bait, "And so, Rodrigo, you have a hypothesis of some sort. Something that occurred to you on reading those four books?"

"I do," Rodrigo said, smiling. (He's never at a loss for an intriguing theory, I reflected. Their baby is going to be really something, I thought, catching a glimpse of Giannina's mother out of the corner of my eye as she reached to pass around a plate of some sort of homemade cookies).

But instead of pursuing Rodrigo's theory right away, I said, "Before you jump into that, maybe we should take turns summarizing the four books. Your mother-in-law may not have read them all."

As Mrs. Pellegrini smiled appreciatively, Rodrigo looked up at Giannina and said, "Why don't you start?"

A. NATIONAL URBAN LEAGUE, *THE STATE OF BLACK AMERICA 1998*

"I read the first book, *The State of Black America 1998*,¹⁰ the other afternoon, while waiting for a baby shower to start. It almost ruined the event for me. The editors of this annual volume, published yearly since 1976, commissioned nine authors to write essays on the state of the African-American community in America. The general tenor is measured, even upbeat at times. Yet, I was struck by how far this country has to go to make good on its civil rights promises. In one way or another, most of the chapters deal with barriers to upward mobility. Essays on building community¹¹ and the racial asset gap¹² focus on economics and the dire need to provide development and jobs to a community whose lower end, at least, seems to be slipping further and further behind. Community revitalization programs are fighting a losing battle,¹³ as the nature of the workplace changes and jobs leave the inner city for the suburbs."¹⁴

"Or even abroad," Rodrigo pointed out.

"Indeed," Giannina continued. "The recent economic expansion has not helped African-Americans, because it has created jobs mainly in information technology and computers, not labor.¹⁵ Recent welfare reforms force workers into part-time jobs that go nowhere, instead of providing full-time jobs with a future."¹⁶

"One essay points out that neighborhood joblessness is in some respects

10. NATIONAL URBAN LEAGUE, *supra* note 4.

11. *See id.* at 37-51.

12. *See id.* at 15-36.

13. *See id.* at 37-51, 89-105.

14. *See id.* at 195-227 (showing how low technology and factory jobs have disappeared with the advent of an economy based on information and computers).

15. *See id.*

16. *See id.* at 53-69, 89-105, 195-207 (detailing devastation wrought by joblessness).

worse than poverty,"¹⁷ Rodrigo chimed in. "Employment provides an anchor of disciplined habits, along with a cluster of hopes and attitudes.¹⁸ These are passed on to children, who see their parents getting ready for work in the morning, depositing a paycheck, giving them their allowance, and discussing their hopes for a promotion. With technology and the suburbanization of jobs, more advantaged or stable families leave the inner city,¹⁹ accelerating the decline in essential services.²⁰ Over time, conditions deteriorate to the point where employers will not hire anyone from inner city neighborhoods, a sort of statistical racial discrimination."²¹

"Another problem the authors point out concerns schools,"²² Giannina went on. "Two writers observe that creation of new state and national standards for school achievement will do little good without better teaching, curriculum, textbooks, and buildings.²³ The reduction in the number of low-skilled jobs means that education is even more necessary for economic success and perhaps simple survival. But spending disparities ensure that schools in poor neighborhoods, most in need of the best teachers and computers, possess little of either.²⁴ Tracking assigns African-Americans and Hispanics to low-level, dead-end classes, while suburban kids learn computer programming and how to navigate the Internet."²⁵

Giannina paused as though to remember a final chapter, and Rodrigo jumped in.

"Which brings us to politics. Even modest electoral gains by African-Americans, due to federal intervention through the Voting Rights Act and the increase in numbers reaching voting age, have done little to improve the quality of life in black-dominated cities.²⁶ Coalition-building has been a problem—black politicians need to court whites, thereby diluting programs and political strength.²⁷ Colin Powell raised the hopes of African-Americans but, unfortunately, his campaign went nowhere.²⁸ The book closes with appendices on African-American demographics and vital statistics on education and earnings,²⁹ including the disconcerting news that the racial disparity in college enrollment rates has been growing, not shrinking, in recent years."³⁰

17. *See id.* at 37–51, 89–105 (showing impact of unemployment on the black family and other social institutions).

18. *See id.*

19. *See id.*

20. *See id.* at 89–105.

21. *See id.*

22. *See id.* at 109–60.

23. *See id.* at 139–40, 141–44.

24. *See id.* at 131–35.

25. *See id.* at 109–227.

26. *See id.* at 247–69.

27. *See id.* at 250–54, 262–64, 268.

28. *See id.* at 254–58.

29. *See id.* at 277–304.

30. *See id.* at 290.

B. TERRY EASTLAND, *ENDING AFFIRMATIVE ACTION*

Giannina looked up at Rodrigo and said, "Your turn."

Rodrigo picked up a silver and black book with familiar writing on the cover and said, "This second book, by former Justice Department official Terry Eastland,³¹ could not be more different from our first. Taking as his target our national commitment to affirmative action, he turns nearly every legal advance made in favor of African-Americans and other minorities against them.³² Under the guise of showing how we arrived at our national scheme—now being dismantled—of what he calls 'racial preferencing,' he argues that judicial and executive rulings corrupted the noble civil rights ideal into a system of patronage.³³ Equating actions designed to level the playing field for Hispanics, African-Americans, and other minorities with discrimination against whites, he rehearses the tired 'stigma' argument under which even high-achieving minorities are thought to be inferior, having arrived at their positions through affirmative action.³⁴ He also conveniently ignores that the civil rights laws of the last few decades and the court decisions of the 1950s and '60s that prohibited race discrimination were meant to help *disempowered* minorities, not *empowered* whites.³⁵ Whites didn't then, and don't now, need legal protection against race discrimination. Whites are in power—at least vis-à-vis minorities—so who's going to discriminate against them?"

"It seems to me that Eastland ignores the context in which minorities won civil rights victories and assumes that all these laws were designed to restore the great American tradition of color-blind law,"³⁶ Teresa said. "But what tradition is he talking about? The Constitution contains several passages that specifically recognize and protect the institution of slavery.³⁷ The Declaration of Independence may say 'all men are created equal,'³⁸ but African-American men didn't even get the vote until Congress enacted the Fifteenth Amendment in 1870.³⁹ Eastland forgets this past when he says that we need to rid ourselves of affirmative action and return to the color-blind principles that made our nation great."

Rodrigo shot his mother-in-law a quick look. "For a nonlawyer, Mom, you

31. EASTLAND, *supra* note 5.

32. *See id.* at 9, 59, 76, 90, 152.

33. *Id.* at 21–38, 195–200 (charging that affirmative action betrays the colorblind ideal); *see also id.* at 7, 17, 80.

34. *See id.* at 9, 85, 141, 198.

35. *See, e.g.,* Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986) (arguing that the purpose of civil rights statutes should not be the policing of colorblind neutrality, but the removal of subordination).

36. *See* EASTLAND, *supra* note 5, at 21–38, 199–200.

37. *See* DERRICK A. BELL, JR., *RACE, RACISM, AND AMERICAN LAW* 27–28 (3d ed. 1992) (noting four clauses whose purpose or effect was to protect the institution of slavery).

38. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

39. *See* U.S. CONST. amend. XV (providing for nondiscrimination on the basis of race in voting). Women did not receive the vote until 50 years later. *See* U.S. CONST. amend. XIX (adopted in 1920).

sure know your legal history. But speaking of that history, Eastland certainly offers up a warped and selective view of it. He devotes little space to the legacy of slavery, conquest, and Jim Crow laws that made affirmative action necessary in the first place, instead relying on the feeble excuse that 'My grandfather may have hated blacks, but I don't. And it's unfair to make me pay for the crimes of my ancestors.'⁴⁰ His book is essentially a rehash of the same standard arguments against affirmative action that we've all heard a thousand times before—affirmative action must go because it discriminates against whites,⁴¹ stigmatizes blacks,⁴² is potentially limitless because it could be extended to Ukrainians and Romanian gypsies,⁴³ and rewards people who lack conventional merit.⁴⁴ On that latter point, Eastland should read our next book, *The Shape of the River*.⁴⁵

C. WILLIAM G. BOWEN AND DEREK BOK, *THE SHAPE OF THE RIVER*

"Eastland sounds somewhere between unsympathetic and hateful toward minorities," said Mrs. Pellegrini, with a look of distaste. "Although my family is not black, it is Italian. My parents told me stories of how society treated our people in the early days that you wouldn't believe. So, naturally we're sympathetic to the plight of blacks and Latinos. How a patrician writer like Eastland, writing from a position of privilege, can say some of those things is beyond belief."

I gave her a look of admiration and thought, I very much hope she will agree to have lunch with me. Then, sensing an opening, I said, "Maybe you and I can compare notes some time. Our families seem to have followed similar paths. Speaking of paths, I think we all know about our next book, which followed the career paths of over 45,000 African-American undergraduates.⁴⁶ Beneficiaries of affirmative action,⁴⁷ they all matriculated at twenty-eight elite colleges and universities in the Falls of 1976 and 1989.⁴⁸ William Bowen and Derek Bok, past presidents of Princeton and Harvard respectively, wrote the book to answer the question, 'Has affirmative action worked?' After rigorously comparing the paths of African-Americans admitted to elite schools under affirmative action programs to those of whites at elite schools, and of African-Americans admitted to less competitive schools without the help of affirmative action, Bowen and Bok conclude that by most criteria, affirmative action has indeed improved the lot of its intended beneficiaries.⁴⁹ As the first major statistical study of the

40. See EASTLAND, *supra* note 5, at 2–8, 17, 76, 152 (rejecting imposition of costs of racial remedies on whites who were not responsible for racial sins).

41. See *id.* at 3–6, 92–116.

42. See *id.* at 9, 85, 141, 148.

43. See *id.* at 8–9, 140, 143–58 (asserting that affirmative action is unable to draw principled lines).

44. See *id.* at 1–6, 9, 59–60 (charging that diversity programs place racial balance over merit).

45. BOWEN & BOK, *supra* note 6.

46. See *id.* at xxvii–xxx.

47. See *id.* at xxvii–xxx app. A.

48. See *id.* at xxviii–xxix (describing data set).

49. See *id.* at 53–192, 336–49 (notes on methodology and statistical strength of outcomes).

effects of affirmative action, their work provides a compelling rebuttal to conservative attacks on the program.”

“Their main findings,” Giannina continued, “were that African-Americans at the most elite schools received higher grades than African-Americans at less competitive schools,⁵⁰ graduated at higher rates than African-Americans at less competitive schools,⁵¹ went on to law, medical, and other graduate schools in greater numbers than their counterparts from less competitive schools,⁵² and reported higher earnings than African-Americans from less competitive schools.⁵³ Based on these same factors, they also found smaller gaps between blacks and whites from elite schools than between blacks in general and whites in general.⁵⁴ In response to the concern that affirmative action stigmatizes African-Americans, they investigated whether African-Americans from elite schools were dissatisfied with their undergraduate and post-undergraduate careers. They found instead that African-Americans who got into elite schools under affirmative action were happier than ones who went to less competitive schools where affirmative action wasn’t necessary for them to be admitted.⁵⁵ They also found that these African-American graduates assumed positions of civic and community leadership, and that they contributed to a racially diverse learning environment while in college.”⁵⁶

“In short, Bowen and Bok provide strong evidence that African-Americans are better off with affirmative action than without it,” Rodrigo concluded. “They also show that ending affirmative action would almost eliminate African-American presence at elite schools,⁵⁷ while increasing white enrollment by, at most, two percent.⁵⁸ But for conservatives like Eastland, nothing African-Americans have suffered at the hands of white society can possibly justify an infinitesimally smaller white enrollment at the top colleges. Think of all the interesting careers that would have been denied to the black graduates Bowen and Bok describe if Eastland had his way.”

D. PAUL BARRETT, *THE GOOD BLACK*

“Some of those graduates *did* pursue interesting careers,” Mrs. Pellegrini said. “I wish all young people were as public-spirited as the ones in that sample. But I think it must be harder these days. At the wildlife federation, we have two young interns from the local college. They would love to go to work for us after they graduate, but say they can’t because they have to get high-

50. *See id.* at 53–90.

51. *See id.* at 53–90, 353–54.

52. *See id.* at 91–117, 355–56.

53. *See id.* at 118–54, 357–58.

54. *See id.* at 277–84.

55. *See id.* at 155–92.

56. *See id.* at 155–92, 279–80, 358.

57. *See id.* at 281–82, 284–86.

58. *See id.* at 280–82, 284–86 (displacement on order of 1.5%).

paying jobs to pay off their student loans. One is going into investment banking, the other to law school."

"Speaking of law school and lawyers," Giannina said, "the last of our four books⁵⁹ deals with a young lawyer, Larry Mungin, who followed a different strategy from the ones we have been discussing. The son of an absentee father and an ambitious secretary mother,⁶⁰ he decided early in life to play things straight.⁶¹ Starting in the mid-1960s, his mother had him bused to a white school system, where he earned good grades and later became senior class president, despite being somewhat reclusive.⁶² His older, more popular, sister campaigned for him. Mungin's brother and sister remember social discrimination, such as being followed by store clerks, but Mungin remembers none, saying he 'wasn't fixated on [race].'⁶³

"A graduate of Harvard College and Harvard Law School, he worked at several law firms before bringing his six years of experience to the Washington, D.C. office of the big Chicago firm Katten Muchin & Zavis.⁶⁴ There, he was promised challenging bankruptcy work and a partnership track. When he received routine assignments that should have been given to a first-year associate or paralegal, he would politely ask his supervisors to give him ones appropriate to his level of expertise.⁶⁵ But they ignored him, then later told him they couldn't make him a partner because he wasn't doing challenging enough work.⁶⁶

"Even then, he did his best to smile and keep his complaints to himself, perhaps remembering his mother's admonition to be a human being first, an American second, and a black third.⁶⁷ When his mistreatment became intolerable, he decided to bring a race discrimination suit. Katten Muchin argued in defense that it mistreated everyone, not just minorities.⁶⁸ A jury didn't buy it; they awarded Mungin \$2.5 million.⁶⁹ The firm asked the trial judge to overturn the verdict, but he refused, finding the jury's verdict reasonable based on the evidence presented at trial.⁷⁰ But an appellate court took the extraordinary step of reversing the jury verdict, and Mungin got nothing.⁷¹

59. BARRETT, *supra* note 7 (detailing the story of Larry Mungin, an African-American lawyer, written by his one-time school roommate, Paul Barrett).

60. *See id.* at 23, 26–27. Mungin's mother took him on weekly trips to the public library and bought him a set of Funk & Wagnalls encyclopedia—one book, one dollar at a time—from the A & P; Mungin read them all, start to finish. He also read Norman Vincent Peale on how to influence people, as well as vocabulary-building books. *See id.*

61. *See id.* at 6, 28, 41, 66, 162.

62. *See id.* at 23, 30–31 (noting that he excelled on the debate team).

63. *Id.* at 23–24; *see also id.* at 64, 65, 68, 78 (ignoring slights such as "nigger" and keeping his feelings bottled up).

64. *See id.* at 80–91.

65. *See id.* at 97–99, 123.

66. *See id.* at 113–22, 180.

67. *See id.* at 24 (recalling his mother's counsel that he not dwell on his race).

68. *See id.* at 113–80.

69. *See id.* at 238–39.

70. *See id.* at 248–51.

71. *See id.* at 271.

“His case is a lesson in the dangers of assimilation. Mungin did his best to deny that race was important. He played by the rules of the white world and tried quietly to fit in.⁷² But in the end, he realized race still retains its malevolent efficacy. His discrimination suit cost him his career—few, if any, large firms will hire someone who has sued a former employer. Maybe it would have been worth it if Mungin had been able to keep the jury award. But for all his efforts to fit in, Mungin gained nothing and lost a lot. Assimilation is a dangerous strategy: it can cost you your soul, career, and self-respect.”

We were all silent for a minute, absorbing the bleak quandary our analysis had left us in. Then, I looked over at Rodrigo. “I believe you were going to tell us about a hypothesis of some sort. I hope it has to do with a way African-Americans and other people of color can break out of doomed or self-defeating strategies like the ones the four books cover.”

When Mrs. Pellegrini also nodded encouragingly, Rodrigo picked up his cup and saucer and said, “Giannina and I think we need to clear away some of the clutter and start over with some new approaches, including one or two we think will knock your socks off. Speaking of clutter, why don’t we clear the table and start over. Would everyone like soup and bread?”

We all nodded and carried the dirty dishes into the kitchen in exchange for bowls from Mrs. Pellegrini into which Giannina ladled out servings of steaming soup with colorful vegetables floating on top. As we filed back into the living room, I noticed that Mrs. Pellegrini allowed the young people to go ahead of us. I took advantage of the moment to pose the possibility of lunch next week and was delighted when she quickly agreed. “I’ll call you tomorrow,” I said, then wondered if Giannina, just ahead of us, had overheard. Did I just imagine that she smiled at me slightly as we sat down again? I quickly looked away. Come now, I thought to myself, I am, after all, nearly seventy years old and a widower. We old-timers are entitled to a little companionship from time to time, are we not?

II. IN WHICH RODRIGO AND GIANNINA PUT FORWARD SEVERAL THEORIES FOR PROTECTING THE INTERESTS OF PERSONS OF COLOR

I pulled myself together as Rodrigo began.

“Well, as you can imagine, I think we need some wholly new approaches. Our four books show that litigation has been producing fewer gains,⁷³ affirmative action is on the way out,⁷⁴ and self-help aids only those who have

72. See *supra* notes 61–63, 66–67 and accompanying text; see also BARRETT, *supra* note 7, at 281.

73. See BARRETT, *supra* note 7; CHARLES R. LAWRENCE III & MARI J. MATSUDA, WE WON’T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION 41–58 (1997); GIRARDEAU A. SPANN, RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA 119–49 (1993); Delgado, *Rodrigo’s Fourth Chronicle*, *supra* note 1, at 1134, 1139–46, 1152–55.

74. See, e.g., *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) (declaring race-based admissions process at the University of Texas law school unconstitutional); *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994) (holding race-targeted college scholarship program unconstitutional); see also CAL. CONST.

something to invest.⁷⁵ Playing it straight—assimilation—exact a terrible cost and even then guarantees no sure reward.”⁷⁶

As Rodrigo paused for effect, Mrs. Pellegrini asked if I would like some coffee. As she leaned close I noticed the faint scent of apricots. I nodded gratefully, “Decaf, if you have it,” after which she took orders from the others.

“Talk about something else,” she asked, disappearing into the kitchen. While Teresa was away, I asked Giannina a little about her family history and learned that she had been raised in Sardinia, off the coast of Italy, where her father, a captain in the Italian navy, had been assigned to an outpost. After he died, Giannina and her mother emigrated to Canada, spending several years in Calgary, then relocated to New York where Teresa worked as a translator for the United Nations. I learned that in addition to loving animals and wildlife, Teresa was a devotee of the theater. Aha! I thought, remembering that my campus’s theatre department was about to start a run of Beckett’s *Waiting for Godot* and relishing the possibility of attending it with the beautiful Teresa.

I snapped to attention as our hostess emerged from the kitchen with a tray full of coffee cups and two decanters of coffee. Placing them on the table and looking over at her son-in-law, she said, “Now, where were we?”

“Rodrigo was about to entertain us with his thoughts on the future of civil rights theory,” I said. “Since traditional approaches are not working, new ones need to be explored.”

“I have a few in mind,” Rodrigo said. “Giannina and I were thinking about this recently in connection with a grant application we were filling out.”⁷⁷ He looked over at his wife expectantly.

A. THE FIRST NEW APPROACH: INTERNATIONAL HUMAN RIGHTS LAW

“One approach that occurred to us is international human rights law,” Giannina began. “Indigenous groups, including Native Hawaiian people, have been invoking this body of law to good effect.⁷⁸ And recently, Amnesty International blasted the United States for tolerating widespread police brutality toward

art. 1, § 31(a) (codifying Proposition 209, forbidding use of race in governmental programs); EASTLAND, *supra* note 5 (vehement attacks on the program in its entirety); Delgado, *Rodrigo's Tenth Chronicle*, *supra* note 1.

75. Compare NATIONAL URBAN LEAGUE, *supra* note 4, at 37–51, 89–105 (urging self-help measures), with ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL 108–09 (1992) (African-American men comprise only 3.0% of self-employed men; small businesses owned by blacks account for only 2.4% of all businesses), and Delgado, *Rodrigo's Second Chronicle*, *supra* note 1 (doubting that marketplace solutions, without love and social commitment, will bring significant gains).

76. On the psychic and personal risks of assimilation, see generally BARRETT, *supra* note 7; KEVIN R. JOHNSON, HOW DID YOU GET TO BE MEXICAN? A WHITE/BROWN MAN'S SEARCH FOR IDENTITY (1999); Delgado, *Rodrigo's Fifteenth Chronicle*, *supra* note 1.

77. For the outcome of the grant proposal, see DELGADO, *supra* note 9, at 237–42.

78. See S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 GA. L. REV. 309, 336–60 (1994); Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L.J. 660, 701–03 (1990).

minorities, mistreatment of female inmates, including selling women to male prison guards or prisoners as sex slaves, shackling, and the use of devices like Tasers, stun guns, and stun belts.⁷⁹ The organization also flagged America's frequent resort to the death penalty, its mistreatment of political asylum seekers, who are often thrown into jail like ordinary criminals, and its toleration of the execution of juvenile offenders.⁸⁰ These practices supposedly violate several international treaties, including some to which the United States is a signatory."

"The news created a sensation, if I recall," I interjected.

"Right," Teresa replied. "The United States is not used to being fingered as a violator of human rights law. That body of law is supposed to apply to other countries, usually our enemies. The idea that we are the violators and might be brought to the attention of the United Nations or charged in an international tribunal goes against our self-image. Human rights violations are what those other people do, not us.

"Hmmm," Teresa mused. "It occurs to me that even if formal charges are not brought, merely framing things this way could have a healthy result. Recent studies rank the United States low among Western industrialized countries in access to health care,⁸¹ infant mortality,⁸² and life expectancy in minority communities.⁸³ Furthermore, the gap between the wealthy and the poor in income and assets,⁸⁴ educational achievement—particularly in math and the sciences⁸⁵—and salaries paid to public school teachers⁸⁶ is disturbing. The United States is used to thinking of itself as the best, freest country in the world, with the highest standard of living. Pointing out how the plight of its minority

79. See William Raspberry, *Human Rights Abuses, Not Abroad, But at Home*, WASH. POST, Oct. 12, 1998, at A21; Amnesty International, *Recommendations to the United States Government to Address Human Rights Violations in the USA* (visited Mar. 4, 1999) <<http://www.rightsforall-usa.org/info/action/index.html>>.

80. See Raspberry, *supra* note 79; Amnesty International, *supra* note 79; see also Delgado, *Rodrigo's Eighth Chronicle*, *supra* note 1, at 530.

81. See David Mechanic, *Professional Judgment and the Rationing of Medical Care*, 140 U. PA. L. REV. 1713, 1738 (1992); Avram Goldstein, *GU Study Finds Disparity in Heart Care*, WASH. POST, Feb. 25, 1999, at A3; Brigid Schulte, *Unequal Care For Minorities—Even the Rich, Educated, Insured—Prospect of Healthy Life Less Sure*, DETROIT FREE PRESS, Aug. 3, 1998, at 1A; Jack E. White, *Prejudice? Perish the Thought*, TIME, Mar. 8, 1999, at 36.

82. See Leon Forer, *Low Marks for Health Care*, NEWSDAY, Dec. 7, 1991, at 16; Schulte, *supra* note 81.

83. See Christine Russell, *How Goes the War on Cancer? Cancer Gaining on Heart Disease as Number One Killer*, WASH. POST, Feb. 14, 1995, at Z12; Schulte, *supra* note 81, at 1A.

84. See MELVIN OLIVER & THOMAS SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* (1995); *Setting the Record Straight on the State of Black Inequality in the United States*, J. BLACKS IN HIGHER ED., Autumn 1998, at 46; Allen S. Hammond, IV, *Universal Access to Infrastructure and Information*, 45 DEPAUL L. REV. 1067, 1091 n.80 (1991).

85. See Christopher D. Pixley, *The Next Frontier in Public School Finance Reform: A Policy and Constitutional Analysis of School Choice Legislation*, 24 J. LEGIS. 21, 31 (1998); Sarah Wyatt, *U.S. Lagging on Graduation Rates: International Group Ranks American Eighth Graders Low in Math*, BOULDER DAILY CAMERA, Nov. 24, 1998, at 7A.

86. See *Letters, Faxes & E-mail: Let Parents Decide*, DENV. POST, Sept. 27, 1998, at K2; Wyatt, *supra* note 85, at 7A.

populations and the poor belies this claim—through charges that the United States is in violation of international law—might supply a powerful stimulus for change.”

“I’m not so sure,” I grumbled. “In the old days, when we were competing with the Soviet Union for the hearts and minds of the uncommitted third world—most of which was black, brown, or Asian—that might have been true.⁸⁷ Then, we had to be concerned with minorities in the United States, because otherwise the communist bloc could argue that the unaligned countries should side with them, rather than with us, their racist rival.⁸⁸ With the dismantling of the Soviet Union, this is no longer true. Without the spur of Cold War competition, I don’t see why this country could not just let black and brown misery—like that documented by the Urban League⁸⁹—deepen. So long as the economy is humming along and middle class, Caucasian people are doing well, I don’t see the occasional report by an international organization as likely to spur more than a few cosmetic changes. We could ignore world opinion just as we ignore domestic organizations like the Urban League or NAACP. I hope the two of you have more arrows in your quiver than that.”

B. THE SECOND APPROACH: JUDICIAL AND JURY NULLIFICATION

“We know it’s not the final answer. A second strategy, for lawyers, would be to promote nullification of unfair laws and practices,” Rodrigo continued. “I’m sure you remember Paul Butler’s proposal in the *Yale Law Journal*.”⁹⁰

“Even I, a nonlawyer, heard about that,” Teresa chimed in. I looked at her with respect and admiration. She blushed slightly and went on. “I heard him on NPR the other day. He urges African-American jurors to acquit African-American defendants, particularly young black men charged with nonviolent crimes,⁹¹ if the jurors believe that the police are racist or that the young man is more valuable to the community free than behind bars.”⁹²

“We were discussing this issue in my advanced criminal law class the other day,” Giannina interjected. “The problem is that it’s illegal for the lawyer even to mention to the jury that they have this power.⁹³ As my professor conceded, juries have this power, one that is as old as the institution of the jury itself and

87. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980) (noting that the NAACP and federal government in *Brown* argued that desegregation would help the United States compete with the Soviet Union for alliances with third world countries).

88. See *id.* at 524.

89. See NATIONAL URBAN LEAGUE, *supra* note 4.

90. See Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L. J. 677 (1995) (urging that black jurors nullify prosecutions whose basic fairness they doubt).

91. See *id.* at 715.

92. See *id.* at 692, 716–18 (detailing the balancing approach such jurors may legitimately bring to bear on decision to nullify).

93. See Nancy J. King, *Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom*, 65 U. CHI. L. REV. 433, 434 (1998).

has been used to prevent enforcement of laws that offend the community.⁹⁴ But a lawyer who even hints to the jury that they should consider nullification can be cited for contempt or even disbarred.⁹⁵ It seems to me like a right without a remedy.”

“But that’s the beauty of what Professor Butler has done,” Teresa added excitedly. “He has gone on radio, especially black radio, and TV telling everyone about his approach.”⁹⁶

“Isn’t he risking bar sanctions?” I asked.

“Possibly,” Giannina said. “Although in my professional responsibility class, we learned that a lawyer may advocate law reform outside the courtroom.⁹⁷ This is a right protected by the First Amendment.⁹⁸ Lawyers may even discuss civil disobedience, so long as they don’t expressly advocate it.”⁹⁹

“What about parts of the country where African-Americans and Latinos fall below, say, thirty percent of the population?” I asked. “There, juries may contain no minority members, or too few to make a difference.”

“That reminds me of a case I heard about on NPR,” Teresa said, touching me lightly on the arm to emphasize the coincidence. “Just the other day, a reporter described the case of federal judge Nancy Gerstner, who refused to apply a three-strikes type law against an African-American whose prior offenses had to do with automobiles and driving.¹⁰⁰ She reasoned, based on social science studies that show police pull African-American motorists over on suspicion more often than whites, that the defendant’s previous record was tinged by race.¹⁰¹ He received a lesser sentence than he would have if he had been nonblack with the same number of prior offenses.”¹⁰²

“A type of judicial nullification,” I said admiringly. “I think I’m going to increase my contribution to National Public Radio. I hadn’t heard about that case.”

“I actually volunteer for the station,” Teresa said, modestly. “If you send in your check before the fifteenth of this month, we’ll invite you to our Fall party. I don’t suppose professors dance?”

The idea of dancing with Teresa made my head swim. “In my youth, I was not bad,” I mumbled, trying to sound nonchalant. “I might need a few refresher lessons.”

“I doubt it,” Teresa said, her eyes twinkling. I made a mental note to write the check as soon as I got home.

94. See Butler, *supra* note 90, at 701.

95. See King, *supra* note 93, at 434.

96. See Interview with Paul Butler, Professor of Law at George Washington University, in Boulder, Colo. (Feb. 8, 1997).

97. See ROBERT H. ARONSON, PROFESSIONAL RESPONSIBILITY IN A NUTSHELL 478–83 (2d ed. 1991).

98. See *id.*

99. See *id.*

100. See *Race Factored Into Sentence*, NAT’L L.J., Dec. 28-Jan. 4, 1999, at A8; LAW. WKLY. USA, Jan. 25, 1999, at 7.

101. See *supra* note 100.

102. See *id.*

While I was pondering what it would be like to dance a sedate foxtrot with my apricot-scented dinner companion, Rodrigo spoke up. "Judicial nullification could, of course, cut both ways. Do you remember how in *The Good Black*, Larry Mungin considered that the appellate court nullified his victory before the jury?¹⁰³ A perfectly reasonable jury found that Mungin had suffered discrimination.¹⁰⁴ The trial court refused to overturn the verdict.¹⁰⁵ But the appellate court reversed the jury's decision.¹⁰⁶ Judicial nullification, perhaps even more than the jury variety, can turn against us as easily as it can help. For this reason, we need other approaches. Would you like to hear more?"

C. THE THIRD APPROACH: CLASS-BASED AFFIRMATIVE ACTION WITH A TWIST

"Of course," Teresa and I said at the same time. After we exchanged laughs, Giannina began as follows.

"We're sure you know that a host of commentators have been urging that race-based affirmative action, now under siege, be replaced with a version based on socioeconomic status, or class."¹⁰⁷ When Teresa and I both nodded, she continued, "Whether we like it or not, many oppose affirmative action and want to end the program. In that sense, Eastland's book merely articulates what many are thinking."

"Such as the voters in California¹⁰⁸ and Washington,¹⁰⁹ conservative legislators in a host of states,¹¹⁰ and litigators at think tanks and right-wing public interest centers around the country,"¹¹¹ I added.

"And, do you recall Paul Barrett's concern about reckless affirmative action?"¹¹² Giannina went on. "Companies hire minorities to feel good about themselves, then let the new hires wither on the vine.¹¹³ With conservatives attacking affirmative action, the public growing disenchanted with it, and employers performing it recklessly, we had better be ready with something better."

Once again, I took the bait. "What do you have in mind?"

103. BARRETT, *supra* note 7, at 276.

104. *See id.* at 238-39.

105. *See id.* at 248-50.

106. *See id.* at 271.

107. *See generally* RICHARD D. KAHLENBERG, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* (1996) (urging shift away from race- to class-based affirmative action).

108. *See* CAL. CONST. art. 1, § 31 (codifying 1995 California Civil Rights Initiative).

109. *See* Heath Foster, *Affirmative Action Rules Tossed Out by State Voters*, *SEATTLE POST-INTELLIGENCER*, Nov. 4, 1998, at A1.

110. *See* JEAN STEFANCIC & RICHARD DELGADO, *NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA'S SOCIAL AGENDA* 45-81 (1997).

111. *See id.*

112. *See* BARRETT, *supra* note 7, at 280.

113. In the wake of Mungin's jury award (later overturned on appeal), some law firms reacted not by paying better attention to affirmative action and their minority associates, but by vowing to give up minority hiring entirely as too much trouble. *See id.* at 246.

"I'm not sure it's better, but many are calling for a shift to class-based affirmative action,"¹¹⁴ Giannina said. "In this version, disadvantaged applicants, such as those who experienced early childhood poverty, frequent moves, a broken home, and similar challenges, would receive preference in jobs and college admissions.¹¹⁵ This will supposedly help minorities, because many are poor and suffer social disadvantage, including discrimination."¹¹⁶

"But we all know that won't happen," I said. "The number of poor whites will swamp that of African-Americans and minorities. So, if a university decides to reserve, say, fifteen percent of its slots for affirmative action candidates, only a small portion of that fifteen percent will be candidates of color. The number of minorities on the nation's campuses will plummet."

"Just as it did at Berkeley and Texas in the wake of the referendum¹¹⁷ and that awful case, *Hopwood v. Texas*,"¹¹⁸ Teresa added.

"Right," Giannina continued. "But there's also what Deborah Malamud calls the 'top of the bottom' problem.¹¹⁹ Are you familiar with the term, Mom?"

When Teresa looked dubious, I conceded, "I'm not sure I am, either."

Giannina explained, "Conservatives are fond of pointing out that ordinary, race-based affirmative action benefits mainly those who need it least. The sons and daughters of middle- or upper-class African-American and Mexican families are the ones who get into Harvard or Berkeley, not ones from the inner city or barrio. That's because admissions officers at elite schools, not surprisingly, look for minority kids most likely to succeed in their highly competitive environments—ones who resemble their white classmates as much as possible."¹²⁰

"Assimilated, in other words," I said, "privileged, graduates of prep schools, sons and daughters of families with book-lined living rooms."

"And do you think this would occur all over again if the nation shifted to a deracinated approach based on socioeconomic status or class?" Teresa asked.

"Consider," Giannina said: "With class-based affirmative action, admissions officers will examine a potential pool of, basically, poor kids. And who will they select out of that pool?"

"The top candidates, of course," I said.

114. See DINESH D'SOUZA, *ILLIBERAL EDUCATION* 251–53 (1991); KAHLLENBERG, *supra* note 107, at 83–120; WILLIAM J. WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 112–18, 146–47 (1987); Mickey Kaus, *Class Is In*, *NEW REPUBLIC*, Mar. 27, 1995, at 6; Michael Kinsley, *Class Not Race*, *NEW REPUBLIC*, Aug. 19, 1991, at 4.

115. See KAHLLENBERG, *supra* note 107, at 129–36 (arguing for replacement of current race-based affirmative action by a version whose touchstone is disadvantage).

116. See *id.* at 136–44.

117. See *supra* note 74 and accompanying text (regarding Proposition 209).

118. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

119. Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 *U. COLO. L. REV.* 939, 995 (1997) (noting how admissions officers compete for the top rung of candidates from the diversity pool).

120. See *id.*

"And those will in most cases be white," Teresa seconded.¹²¹

"Exactly," said Rodrigo. "Which brings us to what Giannina and I were talking about the other day. Do you know, Professor, how conservatives have been challenging race-based affirmative action as a violation of *Regents of the University of California v. Bakke*?"¹²²

"You mean because colleges really don't compare all the candidates with each other?" I asked.

"That, too," Rodrigo conceded. "But we were thinking more of the way *Bakke* requires schools to make race just one factor among many.¹²³ According to affirmative action's detractors, that's exactly what they are not doing. Rather, they are allowing race to serve as the *only* diversity-making factor.¹²⁴ In other words, they are not giving much weight to being a Republican, a war hero, or a successful operator of a small business."

"What's wrong with that?" Teresa asked. "Why shouldn't schools prefer blacks, say, to crew-cutted war heroes, if that's the kind of diversity they want?"

"It's because of the law's definition of a compelling state interest," Giannina replied. "We were talking about this in my constitutional law class the other day. A school cannot call diversity a compelling interest if it applies it selectively. So, diversity must be uniform; it cannot serve as a cover for race. If it does, it loses its reason for being and becomes unconstitutional."¹²⁵

"I see," Teresa said. "So that if schools change to a class-based diversity plan, the same rule would operate. They would have to admit all people who suffered demonstrably severe handicaps, not scoop off just those who were both poor and black, say."

"We do have a twist, however, that might give these programs more bite," Rodrigo said.

I don't see how, I thought glumly. But I said, "If you have any ideas that will brighten up the current dismal landscape for persons of color, I'd love to hear them."

D. GIANNINA'S VARIATION

"We were talking about this just the other day," Rodrigo began. "As you know, Giannina's a third-year student at the other law school in our city. We were comparing notes on the kinds of jobs her classmates were seeking and my research assistants' plans for after graduation. We both knew students who

121. See Richard Delgado, *1998 Hugo L. Black Lecture: Ten Arguments Against Affirmative Action—How Valid?*, 50 ALA. L. REV. 135, 152 (1998) (describing likely consequences of shift to privilege-based programs).

122. 438 U.S. 265 (1978); cf. Delgado, *Rodrigo's Tenth Chronicle*, *supra* note 1, at 1714–15, 1720, 1742–43.

123. See 438 U.S. at 314; see also Richard Delgado & Jean Stefancic, *Home-Grown Racism: Colorado's Historic Embrace—and Denial—of Higher Education Equal Opportunity*, 70 U. COLO. L. REV. 703, 703, 710–14 (1999).

124. See EASTLAND, *supra* note 5, at 80; Delgado, *supra* note 121, at 151.

125. See *supra* note 124.

began by professing great interest in public interest careers but changed their goals as they went through law school and wound up in corporate practice.¹²⁶ We also thought of students from strong academic backgrounds who did only average work in law school, and ones from small, unknown colleges who wound up at the top of their class. This led to a revelation about affirmative action. But I'll let her explain it. Giannina?"

Giannina and her mother both smiled as the impetuous Rodrigo yielded the stage to his brilliant wife, who had been patiently waiting.

"Do the three of you remember how we were saying conservatives have been jumping up and down, insisting that an interest stops being compelling if it is not applied consistently?"¹²⁷ she began.

I said, "Right. Another way of looking at it is that the interest is not narrowly tailored if applied in an overbroad or excessively narrow fashion. Conservatives argue that liberal college admissions committees are doing just that when they admit just African-Americans and Hispanics and not the full range of diversity."¹²⁸

"Exactly," Giannina said. "High school chess champions, and sons and daughters of military attaches who had to attend thirty seven schools when they were growing up. Members of the Young Republicans and junior chamber of commerce. Concert violinists. Kids who made harpsichords in their garages out of a kit."

"And you think that this has some bearing on programs for diversity based on class?" I asked. I did not see the connection my two young friends were trying to draw and wanted them to spell things out a little more.

"We do," Rodrigo obliged. "Consider how a focus on privilege could work if applied across the board. Imagine a school that is comparing two applicants. Applicant A has a grade-point average of 3.2 from a famous prep school and SAT scores of 1210.¹²⁹ As the son of a famous family, he spent summer vacations in Europe and his junior year in an exchange program. He has no particular plans in life, but wants a liberal education to broaden his horizons. His essay describes how hard he worked to make his school's cross country team and how it fortified his character. Applicant B has a 3.4 average from an inner-city high school in an all-Chicano neighborhood and 1050 on his SATs. As a high school student, he stepped in when his father went to jail, worked part time, and helped his mother raise his five younger siblings. His essay describes how he wants to make his life work applying César Chavez's collectivist, religion-based activism to the plight of the *urban* working poor."¹³⁰

126. See Roger E. Schechter, *Changing Law Schools to Make Less Nasty Lawyers*, 10 GEO. J. LEGAL ETHICS 367, 385-86 (1997).

127. See *supra* notes 123-26 and accompanying text.

128. See Delgado, *supra* note 121, at 151; Delgado & Stefancic, *supra* note 123, at 711-12.

129. For a similar scenario, see Delgado, *supra* note 121, at 153-54; see also Delgado, *Rodrigo's Third Chronicle*, *supra* note 1, at 391-405 (on minority community's poverty and despair, and on how these aspects of the community blunt aspirations and demand redress).

130. See Delgado, *supra* note 121, at 153.

"I'm sure all of us would favor the Chicano candidate," Teresa said.

"Without question," Rodrigo agreed. "But what about the other one? All of us know students like that, advantaged, conventional—and fairly dull. Most of them want to just get by, graduate, then take a place in Dad's company. Sometimes you hear of them years later when they finally pass the bar exam on the third try or operate Dad's company so badly that it drops fifty million dollars in value."

"And your plan would single out students like that?" I asked.

"Yes," Giannina said. "We call them paradise-lost kids. Given their advantages in life, they should be performing at a much higher level. We'd apply a discount, to eliminate them from the pool and to clear away the competition for hungry minority kids like Applicant B."

"Now I see the parallel to the conservatives' lament," I said. "If advantage and disadvantage are going to be the touchstone of the new regime, we have to apply them across the board, penalizing candidates at the upper end of the scale who have had great advantages of birth or fortune, but are not doing much with them. Ingenious—if advantage is to be the new criterion for diversity, you need to look at who has been dealt an overly kind hand in life, just as you look to see who has received a harsh one."¹³¹

"A sort of bottom-of-the-top corrective to the top-of-the-bottom problem you mentioned before," said Teresa.

"Something like that," said Giannina, smiling. "Conservatives could, of course, reply that it's wrong to penalize someone for how much money their parents have. Yet, they might well go along with your argument, because they detest laziness and sloth."

"As well they should," said Teresa. "How about moving into the living room. These straight-backed chairs are a little hard."

Giannina readily agreed, and so we cleared the remaining dishes and followed her into the comfortable living room. I noted a photo of a handsome man wearing a military uniform, resting on the piano. With a pang, I realized it must be Teresa's late husband.

After we settled down on sofas and upholstered chairs and Teresa brought out a tray of fruit and cheese, I noticed Giannina and Rodrigo looking up expectantly. "I gather you two have more up your sleeve?"

E. THE FOURTH APPROACH: ENVIRONMENTAL LAW

1. Physical Habitats

"We were just starting to discuss this the other day," Giannina said, accepting my invitation. "We didn't get very far, because something intervened and we

131. In other words, privileged children (such as those from wealthy families) who take for granted their status and the advantages it brings, and who do not work hard to achieve their full potential, are given negative marks when compared to underprivileged children, who even though they do not have many advantages, work hard and achieve.

had to put our discussion on hold. Then, as our trip approached, we thought we'd wait and get your input."

"I gather you're referring to the environmental justice movement,"¹³² Teresa asked. Giannina nodded. "That's been a big issue in my organization. In fact, it's on the agenda for the next directors' meeting. The board is thinking of polling the membership to see if they want to move into this area in a serious way."¹³³

"What are the prospects?" Rodrigo asked.

"Fairly good, I think. The membership is liberal, and the idea of joining a movement that examines the siting of biohazards in minority communities should appeal to many members. No one could quarrel with distributing toxic waste sites, sewage treatment plants, and similar noxious installations equitably instead of concentrating them in poor or minority communities. The board is also considering adding arsenic, lead, and rats—big-city hazards that afflict slums and minority neighborhoods—to our list of environmental concerns."

"You said no one could quarrel with these objectives, Mom. But courts do. I've been learning about the litigation history of the environmental justice movement in my reading group. Most of the cases find that the plaintiffs have no cause of action.¹³⁴ If they sue under the Fourteenth Amendment or a civil rights statute, they lose because they can't prove discriminatory intent.¹³⁵ In most cases, the company or utility located the nuisance where it did, not because it hates black or brown people, but because either the land is cheap or the residents are unlikely to object as vociferously as they might if the biohazard were placed in Beverly Hills."

132. The movement was named and launched by Rev. Benjamin Chavis in the wake of a report by the United Church of Christ that examined inequities in the siting of biohazards. See Sheila Foster, *Race(ial) Matters: The Quest for Environmental Justice*, 20 *ECOLOGY L.Q.* 721, 722–23 (1993). On the movement and its development, see Dr. Robert D. Bullard, *Environmental Justice for All: It's the Right Thing to Do*, 9 *J. ENVTL. L. & LITIG.* 281 (1994); Dr. Robert D. Bullard, *Environmental Racism and Invisible Communities*, 96 *W. VA. L. REV.* 1037 (1994); Dr. Robert D. Bullard, *The Legacy of American Apartheid and Environmental Racism*, 9 *ST. JOHN'S J. LEGAL COMMENT.* 445 (1994); Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 *ECOLOGY L.Q.* 619 (1992); Luke W. Cole, *Remedies for Environmental Racism: A View from the Field*, 90 *MICH. L. REV.* 1991 (1992); Luke W. Cole, *The Struggle of Kettleman City: Lessons for the Movement*, 5 *MD. J. CONTEMP. LEGAL ISSUES* 67 (1993/94); Robert W. Collin & Robin Morris Collin, *Equity as the Basis of Implementing Sustainability: An Exploratory Essay*, 96 *W. VA. L. REV.* 1173 (1994); Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 *NW. U. L. REV.* 787 (1993).

133. See Robert Gottlieb & Peter Dreier, *Environmentalists Torn Between Elitism and Justice*, *HOUS. CHRON.*, Mar. 5, 1998, at A31 (describing similar debate in Sierra Club membership). Teresa's organization's interest may have been triggered by a recent presidential directive ordering agencies of the federal government to develop strategies to minimize inequity in the distribution of environmental hazards. See Exec. Order No. 12,898, 3 *C.F.R.* 859 (1994), reprinted in 42 *U.S.C.* § 4321 (1994).

134. See, e.g., *R.I.S.E., Inc. v. Kay*, 768 F. Supp. 1144, 1150 (E.D. Va. 1991), *aff'd*, 977 F.2d 573 (4th Cir. 1992); *East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning Comm'n*, 706 F. Supp. 880, 887 (M.D. Ga. 1989), *aff'd*, 896 F.2d 1264 (11th Cir. 1989) (both requiring that intent to discriminate be shown before equal protection action would lie).

135. See, e.g., *R.I.S.E.*, 768 F. Supp. at 1149–50; Jill E. Evans, *Challenging the Racism in Environmental Racism: Redefining the Concept of Intent*, 40 *ARIZ. L. REV.* 1219, 1277 (1998).

"And one or two cases that were not brought under civil rights laws, but instead under environmental statutes, fared only slightly better, if I recall,"¹³⁶ I added. "These laws don't require intent, but the usual solution is to remand the case for a fuller hearing. These statutes don't require a substantive result, just due consideration; if the court or agency below skipped steps or moved too fast, the remedy is to slow things down and do it again."¹³⁷

"And in the meantime, Native American children are playing on radioactive waste piled up on the reservation," Teresa added, sadly. "So, what's the solution?"

2. Species Protection

"We're almost afraid to say it," Rodrigo said. "We think it's a different environmental statute: the federal Endangered Species Act."¹³⁸ For people, we mean."

"Do you mean that we should ask Congress or the courts to declare blacks, Chicanos, Indians, and so on endangered species?" I asked, thunderstruck. When Giannina and Rodrigo nodded, a little warily, I continued, "What an audacious idea. It reminds me of something I read by Chris Stone,¹³⁹ but in reverse. I also read somewhere that only 900 Ute Indians are left in Colorado, all the rest having been slaughtered early in history or wiped out by white man's diseases,¹⁴⁰ and that almost twenty-five percent of American Indian women of childbearing age have been sterilized, many at U.S. Public Health Service hospitals.¹⁴¹ And, of course, the black community sometimes describes African-American males as an endangered species,¹⁴² constantly harassed by the police and plagued by high rates of homicide,¹⁴³ high blood

136. See, e.g., *El Pueblo para el Aire y Agua Limpio v. County of Kings*, 22 Env'tl. L. Rep. 20,357 (Cal. Super. Ct. 1991).

137. See *id.* at 20,359.

138. Endangered Species Act of 1973 (ESA), 16 U.S.C. § 1531(1995); see also Jim Chen, *Diversity in a Different Dimension: Evolutionary Theory and Affirmative Action's Destiny*, 59 OHIO ST. L.J. 811, 811 (1998) (rejecting affirmative action as "banal" because comparison to "a series of elaborate legal analogies," including laws protecting biological species, demonstrates that the need for ethnic minorities in workplaces is slight).

139. See Christopher Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450, 456 & n.26, 464–67 (1972) (urging that trees, rocks, rivers, and other "non-animal but natural objects" be permitted to sue—with the aid of a guardian ad litem, to be sure—in their own right for injuries they have sustained at human hands). My two proteges' proposal would, similarly, allow humans to benefit from laws and procedures originally designed with animals in mind.

140. See *Cuthair v. Montezuma-Cortez*, Colo. Sch. Dist. No. RE-1, 7 F. Supp. 2d 1152, 1155–56 (1998).

141. See Nancy Ehrenreich, *The Colonization of the Womb*, 43 DUKE L.J. 492, 514–52 nn.70–74 (1993).

142. See *supra* notes 12–30, 81–83 and accompanying text; see also Robin D. Barnes, *Black America and School Choice: Charting a New Course*, 106 YALE L.J. 2375, 2378 (1997); Jack E. White, *Endangered Species: The Police Component in Black-on-Black Crime*, TIME, Mar. 1, 1999, at 40.

143. See Robert J. Cottrol, *Submission Is Not the Answer: Lethal Violence, Microcultures of Criminal Violence and the Right to Self-Defense*, 69 U. COLO. L. REV. 1029, 1058 (1998).

pressure,¹⁴⁴ incarceration,¹⁴⁵ and early death.¹⁴⁶ As we mentioned, infant mortality¹⁴⁷ and sudden infant death¹⁴⁸ rates are much higher in the African-American community than among suburban whites. So, I suppose that in a sense African-Americans, Indians, and Chicanos are endangered. The Urban League study certainly shows that for blacks.¹⁴⁹ But are you suggesting that the Endangered Species Act should, literally, be applied to them—that blacks should have standing, as it were?”

“Yes,” Rodrigo said with conviction. “Even though the idea sounds novel when you first hear it, no insurmountable barrier prevents its being done, either by judicial construction or express legislative amendment. People are animals, too. We’re all part of the great web of life. Protecting humans beings is certainly as worthy a goal as safeguarding snail darters.”

“This idea of yours definitely takes a little getting used to,” I said. “I hope it wasn’t in your grant proposal.” Rodrigo smiled and shook his head. “But I don’t want to reject it out of hand.” I foresaw some interesting sessions down the road with Teresa, learning more about killer whales and spotted owls while getting to know each other better, but my curiosity got the better of me. “How about a quick tutorial on the ESA and what it provides?”

“Sure,” Giannina said. “Our study group was reading up on it. And, I bet Mom can help us fill in the gaps.”

a. The Endangered Species Act: Source of Substantive Protection. “Lone among environmental statutes,” Giannina began, “the Endangered Species Act provides substantive, not just procedural protection.”

“That’s right,” Teresa interjected. “I’ve been working on an ESA project at the Federation. We were going over *Tennessee Valley Authority v. Hill*,¹⁵⁰ the snail darter case, just last week. For some reason, Justice Burger’s words stuck with me. He wrote that the ESA ‘is substantive in effect, designed to prevent the loss of any endangered species, regardless of the cost.’¹⁵¹ Scholars call the Act the strongest environmental law in the world.¹⁵² But, Giannina, I interrupted

144. See Patricia J. Falk, *Novel Theories of Criminal Defense Based Upon the Toxicity of the Social Environment: Urban Psychosis, Television Intoxication, and Black Rage*, 74 N.C. L. REV. 731, 776 (1996).

145. See MARC MAUER & TRACY HULING, *YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM* (1995); Regina Austin, *Beyond Black Demons & White Devils: Antiblack Conspiracy Theorizing & the Black Public Sphere*, 22 FLA. ST. U. L. REV. 1021, 1025 (1995).

146. See Austin, *supra* note 145, at 1025; *supra* notes 10–30 and accompanying text.

147. See Rodolfo Mafa, *Hazardous Waste Facilities and Environmental Equity: A Proposed Siting Model*, 13 VA. ENVTL. L.J. 375, 467 n.84 (1994).

148. See Stephen R. Kandall & Wendy Chavkin, *Illicit Drugs in America: History, Impact on Women and Infants, and Treatment Strategies for Women*, 43 HASTINGS L.J. 615, 636 (1992).

149. See NATIONAL URBAN LEAGUE, *supra* note 4.

150. 437 U.S. 153 (1978).

151. *Id.* at 188 n.34.

152. See, e.g., Chen, *supra* note 138, at 852–53 (praising ESA for its power and sweep); John Andrew Zuccotti, Note, *A Native Returns: The Endangered Species Act and Wolf Reintroduction to the Northern Rocky Mountains*, 20 COLUM. J. ENVTL. L. 329, 333 (1995); see also Hill, 437 U.S. at 174–76

you. You know how I get carried away on this subject. Why don't you go on telling the Professor how the ESA works?"

"No, you go ahead, Mom," Giannina answered. "You know this stuff better than I do. Besides, I have a feeling the Professor would prefer to hear your voice than mine."

Was Giannina catching on to my interest in Teresa? I thought fast, but only managed an awkward answer. "You both have wonderful voices and intelligent things to say. But if Teresa can shine on environmental topics, let's hear her."

"Thank you, Professor," Teresa replied. "Back to the ESA. The Act has two basic provisions that operate to protect endangered species. One section commands '[A]ll federal agencies to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of an endangered species or result in the destruction or modification of habitat of such species. . . .'¹⁵³ Another applies to private action.¹⁵⁴ It prohibits any person from 'taking' any endangered species.¹⁵⁵ Taking includes any 'significant habitat modification or degradation [that] actually kills or injures' an endangered species."¹⁵⁶

"It sounds like you were quoting verbatim," I said, dazzled by her intelligence and lamenting my own fading ability to bring up texts in class in that fashion, something I had done so well in my youth.

"The Act is so powerful that its words and those of the cases and regulations really stick with you," Teresa said. "Together, these two sections make the ESA applicable to all persons and entities, whether state or federal, public or private. They protect endangered species by focusing on 'critical habitat,' the areas in which species live and depend upon for their survival.¹⁵⁷ They assign protection of 'endangered species . . . the highest of priorities,'¹⁵⁸ even exceeding the economic gains expected from, say, dams."¹⁵⁹

"You used the terms 'endangered' and 'threatened species,'" I said. "Do they have specific technical meanings?"

"Yes, they do," answered Rodrigo, not one to stay quiet for very long. "I've

(describing extraordinary sweeping powers of the ESA). International treaties also protect biodiversity, but in less categorical terms. *See, e.g.*, Multilateral Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087.

153. *Hill*, 437 U.S. at 173 (quoting 16 U.S.C. § 1536 (1994)) (internal quotation marks and emphasis omitted).

154. *See* 16 U.S.C. § 1538 (1994).

155. *Id.*

156. 50 C.F.R. § 17.3 (1998); *see also* *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 697 n.9 (1995).

157. 16 U.S.C. § 1532(5)(A) (1994). "The term ['critical habitat'] for a threatened or endangered species means—(i) the specific areas within the geographical area occupied by the species, at the time it is listed . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed . . . upon a determination by the Secretary [of the Interior] that such areas are essential for the conservation of the species." *Id.*

158. *Hill*, 437 U.S. at 174.

159. *See id.*

become familiar with the statute through my discussions with Mom and Giannina. 'Endangered species' means 'any . . . which is in danger of extinction throughout all or a significant portion of its range.'¹⁶⁰ 'Threatened species' means 'any . . . which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'¹⁶¹ See Mom, I'm quoting too. What do you think?"

"Not bad, Rodrigo. You've learned your lessons well," said Teresa, with a humorous tone that only increased my already strong liking of this spirited woman. "I bet you even know about the 'God squad.'" When Rodrigo furrowed his brow, she explained, "In the wake of *Hill*, Congress established a committee empowered to grant exemptions from section 7 that requires inter-agency consultation and cooperation, a mandate that has been interpreted to impose a duty on the part of every branch and agency to pursue a policy of species preservation."¹⁶²

b. The Act's Extension to Human Beings. "That's quite a statute," I said, feeling that I now knew enough to understand my young colleagues' astonishing proposal. "Thanks for sketching it out for me. But do the three of you really think it might be extended to human beings, in particular minority communities?" Rodrigo and Giannina nodded. "I still have huge doubts. But I can see why you might find it attractive. It draws, potentially at least, on all the approaches you've mentioned today. It would take the best aspects of international human rights law,¹⁶³ in that it demands that we treat minorities humanely—like animals." My three companions smiled at the irony. "Teresa, you mentioned that the international human rights approach frames things in such a way as to have an embarrassment potential that could lead to a healthy result. Calling attention to the way the United States treats animals better than some minorities can certainly do that."

"Most dogs have doghouses; people even worry about displaced prairie dogs. Yet the United States, unlike many Western industrialized countries, has a homelessness problem," Giannina interjected. "Most dogs and cats get vaccinations and a nutritionally balanced diet. The FDA monitors animal products to make sure this is so.¹⁶⁴ Yet, many ghetto kids get neither."¹⁶⁵

"Not just that," Rodrigo added. "In some cities, dogs and cats have their

160. 16 U.S.C. § 1532(6) (1994).

161. 16 U.S.C. § 1532(20) (1994).

162. See Pub. L. No. 95-632, 92 Stat. 3752 (codified as amended, 16 U.S.C. § 1536(e)-(h) (1994)).

163. See *supra* notes 78-89 and accompanying text.

164. See Angela Turruciano, Comment, *The FDA Sends Smoke Signals to Big Tobacco: Will the FDA Suffer Backlash, Will Alcohol Be Regulated Next, and Will the Health of Americans Prevail?*, 25 PEPP. L. REV. 617, 619 (1998).

165. On the lack of vaccinations, see Suzanne Sangree, *Control of Childbearing by HIV-Positive Women: Some Responses to Emerging Legal Policies*, 41 BUFF. L. REV. 309, 443 n.547 (1993). On inadequate nutrition, see Karla A. Francken, Comment, *Lead-Based Paint Poisoning Liability: Wisconsin Realtors, Residential Property Sellers, and Landlords Beware*, 77 MARQ. L. REV. 550, 554 n.17 (1994).

own private cemeteries, with gravestones and carved monuments.¹⁶⁶ Many indigent people have to resign themselves to a much less fancy disposal of their remains.¹⁶⁷ In fact, I was just reading that in certain counties in Colorado where the sugar beet industry attracts large numbers of migrant workers from Mexico, local governments have persuaded the state legislature to pass a bill prohibiting the use of public funds for burial of indigents, whose remains would instead go to a medical school for dissection.¹⁶⁸ The bill struck terror in the hearts of Chicano field workers, many of whom bought burial insurance they could scarcely afford."¹⁶⁹

"Many cities have boutique dog kennels for pets whose owners are going on vacation.¹⁷⁰ And in Los Angeles and other cities, a dog or cat that is neurotic or acts out can be taken to a psychoanalyst for therapy,"¹⁷¹ I added. "Not to mention obedience training."¹⁷²

"The other day," Rodrigo added, "Giannina and I saw a TV program showing a team of veterinarians who were trying to diagnose and cure a sick eagle.¹⁷³ The bird, which had no broken bones or other obvious injuries, was listless and apathetic.¹⁷⁴ They finally concluded it was suffering from lead poisoning."¹⁷⁵

"Just like many black children in inner cities," I said. "Many show dangerous levels of lead in their bloodstreams from old, peeling walls that were painted with lead-based paint.¹⁷⁶ It would be ironic if the eagle received first-class medical attention and the children did not."

"Lead poisoning leads to permanent brain injury and impaired mental functioning,"¹⁷⁷ Teresa added. "So, pointing out the way we treat people less solicitously than some animals should at least get people's attention."

After a pause I added, "Last month, I read about a New Zealand group that is

166. See MARY E. THURSTON, *THE LOST HISTORY OF THE CANINE RACE* (1995); Kelly D. Burgess, *Coping with Your Loss*, PITT. POST-GAZETTE, May 12, 1996, at VE2.

167. See Todd A. Krichmar, *Prepayment of Funeral Expenses for Medicaid and SSI Recipients*, N.Y. ST. BAR J., July/Aug. 1997, at 42 (discussing limitations on funeral arrangements for welfare recipients under pre-1997 New York state law); County Considers Cremation Policy for Poor, PRESS J. (Vero Beach, FL), Dec. 27, 1998, at A10.

168. See Delgado & Stefancic, *supra* note 123, at 787.

169. See *id.*

170. See Diane Calkins, *The Ones Left Behind: Finding Pet Care Can Make, Break Vacation*, L.A. TIMES, June 21, 1990, San Diego County edition, at 3.

171. See K.C. Baker, *The Privileged Pooch*, N.Y. DAILY NEWS, Oct. 13, 1996, at 70.

172. See Jeffrey Steele, *Sit in on Sessions and Get References before Enrolling Your Pet in a Program*, CHI. TRIB., Feb. 21, 1994, at 5.

173. See *Emergency Vets* (Animal Planet television broadcast, Mar. 10, 1999); see also Richard Quinn, *Vet Treats Exotic and Famous Animals*, BOULDER DAILY CAMERA, Mar. 13, 1999, at 8-C.

174. See *supra* note 173.

175. See *id.*

176. See Deborah W. Denno, *Considering Lead Poisoning as a Criminal Defense*, 20 FORDHAM URB. L.J. 377, 398-93 (1993); Clarice E. Gaylord & Geraldine D. Twitty, *Protecting Endangered Communities*, 21 FORDHAM URB. L.J. 771, 776-77 (1994).

177. See *supra* note 176.

seeking human rights for higher apes.¹⁷⁸ They point out that the great apes share many human characteristics, such as self-awareness, the ability to reason, and empathy—the capacity to imagine what others are feeling.¹⁷⁹ I'm starting to come around to your position. In some respects, our society treats animals—pets, anyway—better than it treats the urban poor. And your suggestion is that we point this out and ask for equal treatment?"

"Well, yes," Rodrigo replied. "I don't think that's too much to ask."

"At least it's an arresting analogy," I conceded. "And it does recall affirmative action arguments in urging that people receive at least as much consideration as animals."¹⁸⁰

We were all silent for a moment. Then Rodrigo said, "Positive law in the United States protects flags,¹⁸¹ state flowers,¹⁸² agricultural products from defamation,¹⁸³ and the institution of heterosexual marriage.¹⁸⁴ It would be ironic if it could not protect poor African-Americans, Asians, and immigrant farm laborers just as assiduously."

After another pause, Giannina said, "And do the two of you see how all this ties in with another approach we discussed—judicial and jury nullification?"¹⁸⁵

When I must have looked blank, she continued, "Imagine the effect of minority scholars advocating for inclusion of minorities under endangered species protection! Whole new areas of debate might open up; people would need to confront that, at least in the environmental arena, the law treats minorities worse than it treats animals. One of the chief benefits of nullification is its ability to force attention on law reform and the role of racist cops and unpopular drug laws. The ESA approach has some of the same potential."

"Even if not directly enacted," I said. "And I suppose you think the ESA approach borrows from class-based affirmative action, as well?"¹⁸⁶

"That's right," she continued. "As we know all too well, conservatives like Eastland and increasingly the courts insist that any affirmative action program based on race is unconstitutional.¹⁸⁷ But the notion of 'endangered species,' if extended as we urge, would include *any* human community that presently bears

178. See Allan Coukell, *New Zealand Group Seeks Human Rights for Apes*, DENV. POST, Mar. 16, 1999, at A16.

179. See *id.*

180. See *supra* notes 107–25 and accompanying text (discussing argument to limit affirmative action to the economically disadvantaged on the ground that they suffer at least as much handicap as minorities).

181. See CAL. GOV'T CODE, §§ 399-423 (West 1995) (protecting state seal, flag, and emblems); *United States v. Eichman*, 496 U.S. 310 (1990) (invalidating criminal punishment for flag-burning); *Texas v. Johnson*, 491 U.S. 397 (1989).

182. See CAL. GOV'T CODE § 421 (West 1995) (protecting poppy).

183. David J. Bederan, Symposium: *Limitations on Commercial Speech: The Constitutionality of Agricultural Disparagement Statutes*, 10 DEPAUL BUS. L.J. 191 (1998).

184. See Defense of Marriage Act, 28 U.S.C. § 1738(c) (Supp. 1997).

185. See *supra* notes 90–106 and accompanying text.

186. See *supra* notes 107–25 and accompanying text.

187. See *supra* notes 31–45, 108–13, 122–25 and accompanying text.

or is likely to bear a disproportionate burden of environmental hazards. Worded this way, it should easily survive a charge of reverse discrimination. Listen to me go on—does somebody else wish to speak?”

“I have a concern,” said Teresa.

“What is it? I’m sorry I hogged the floor for so long.”

“Industry and resource developers already hate the ESA the way it is.¹⁸⁸ They’ll hate it even more if it expands. I can hear them already: ‘Where are we going to site any environmental hazards if we have to contend with an ESA that covers human beings?’ ”

“You may have a point,” Rodrigo conceded. “And these criticisms are beginning to get the ear of government.¹⁸⁹ But the revised Act would only prevent the siting of environmental hazards in communities that already endure, or are likely to endure, a *disproportionate* impact from such hazards. Industry could still build so long as it spreads its sites evenly instead of targeting minority communities as it does now. When the original ESA was passed, they asked, ‘How can we afford this?’¹⁹⁰ But industry found a way to survive the protection of snail darters and spotted owls. If we can force industry to protect them, we should certainly be able to force it to protect human beings, too.”

“You’ve got me half sold,” I replied. “Although at first I thought it was off the wall, I now see how your proposal is at least rhetorically and strategically appealing. But could it really be put into effect, do you think?”

“A five-part argument suggests so,” Rodrigo replied. “The first two parts have to do with emotions and plausibility, the last three with logic and analogical reasoning.”

“Stranger things have happened,” I said. “Go ahead.”

(i) *Arguments having to do with plausibility and white resistance*

(a) *Otherness and familiarity; terror and reassurance*

“Have you ever noticed how a certain type of Euro-American thinks nothing of lavishing affection on an African-American or Latino baby?” Rodrigo began.

“You mean on sidewalks and in supermarkets, that sort of thing?”

“Yes. They coo over the infant, say how cute he or she is. They’ll stop the mother, who may be walking the baby in a pram, and ask the baby’s name and how old it is. If the toddler is standing, the white person may pat him or her on the head. They demonstrate genuine affection.”

“And you don’t think it’s a façade, to show how liberal the white is?”

“No,” Rodrigo replied. “In contrast to African-American male teenagers and adults, who strike terror in Euro-American hearts especially when walking in

188. On industry’s resistance, see Martha F. Phelps, Comment, *Candidate Conservation Agreements Under the Endangered Species Act: Prospects and Perils of an Administrative Experiment*, 25 B.C. ENVTL. AFF. L. REV. 175, 175 (1997); Janet McConnaughey, *Students’ Courtroom Triumphs Attract Big-Business Backlash*, DENV. POST, Nov. 13, 1998, at A2; see also *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 714 (1995) (Scalia, J., dissenting).

189. See Michael J. Bean, *Endangered Species, Endangered Act?*, 41 ENV’T, Jan.-Feb. 1999, at 12.

190. *Id.*

groups on a darkened street, African-American babies seem safe and cute, like little animals. Their hearts goes out to them.”

“I see where you are going,” I said. “The idea is to frame the problem in a way the dominant group will accept. Affirmative action won’t work because whites hate to think of themselves as guilty participants in an iniquitous scheme or undeserving beneficiaries of privilege.¹⁹¹ It also requires that they think of black and brown people as victims, when to their way of thinking these people are getting away with all the jobs and advantages—while others in their group are committing crimes.¹⁹² International human rights law, while intriguing, won’t work because Anglo Americans don’t like to think of their country as an international terrorist or violator of human rights—even if it is.¹⁹³ But your endangered species approach only asks them to think of minority people as small animals. Quite unthreatening, even appealing. It’s a little demeaning, but heaven knows, we need all the help we can get. What’s your other argument?”

(b) *Interest-convergence*

“It’s simply interest-convergence.¹⁹⁴ As you know, Derrick Bell and, before him, Charles Beard,¹⁹⁵ proposed that the twists and turns of blacks’ racial fortunes in the United States respond not so much to altruism or evolving notions of decency and human rights as to the self-interest of elite whites.¹⁹⁶ Bell refined this notion lately in the form of ‘racial realism,’ which holds that African-Americans and, presumably, other people of color, must realize that their fortunes are unlikely to improve significantly, and that the only thing left is struggle.”¹⁹⁷

I looked up at Teresa and was intrigued when she seemed familiar with this idea. As though reading my mind, she said, “I’m familiar with Bell, even used some of his work in one of my classes. And I can see how your ESA approach would converge with the interests of the wildlife federation, at least. We have a lot of trouble getting minorities on board. The environmental movement is often accused of being the province of white elites.¹⁹⁸ If minorities are made to feel that the movement is on their side, they are more likely to lend their support. The environmental movement will gather strength at the same time as environ-

191. See Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297, 299–301 (1990).

192. See *id.*

193. See *supra* notes 80–81 and accompanying text.

194. See generally Bell, *supra* note 87 (putting forward argument that elite whites’ interests dictate course of antidiscrimination law).

195. See CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1935).

196. See Bell, *supra* note 87, at 528.

197. Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 364–72 (1992) (arguing that the racial situation of blacks is unlikely to improve but that the civil rights community must persevere, nevertheless).

198. On the disdain many people of color display toward environmental causes, see Pamela Duncan, *Environmental Racism: Recognition, Litigation, and Alleviation*, 6 TUL. ENVTL. L.J. 317, 362 (1993); Evans, *supra* note 135, at 1230–32.

mental racism will weaken. There you have it: interest-convergence. And so, my friends, what do you think?"

"I think Mom is onto something," Giannina said. "I also agree with the more general argument you two made. White people hate being made to feel guilty or like the bearers of undeserved privilege. One thing they do like is animals. If we could get them to see African-American adults, just as they do small black children, as animals, they might be kinder."

"Their treatment is, indeed, at times inhuman," I mused. "Police stop us, even if we are business executives taking a commuter train to work.¹⁹⁹ Early in our history, whites stole the lands of Mexicans²⁰⁰ and Indians,²⁰¹ rioted against the Chinese,²⁰² and passed racist immigration laws against groups of color and southern Europeans merely looking for a better life.²⁰³ Treating us as full equals may be an unreasonable goal. Sadly, the best we can hope for may be to be treated like spotted owls or wild mustangs."

"Someone once wrote that American society feels about the African-American community roughly as it does about saving the whales," Teresa added. "Perhaps it is even less committed to making things better for African-Americans; the whales, at least, are not threatening anyone. But I think you said you had three final arguments, based on logic and analogical reasoning, for making this happen?"

(ii) *Further arguments for extending species protection to human beings*

(a) *To enable society to accomplish directly what it now is doing indirectly*

"We do," Rodrigo began. "The arguments are threefold, and to some extent overlap. The first has to do with the basic policy objective of all environmental law—to protect human beings by protecting our environment.²⁰⁴ The current ESA aims to achieve this objective, but in an indirect, attenuated manner. The theory is that every living thing is part of the web of life on which human beings rely and that removing a single animal from this web may have some *unknown* impact on human health.²⁰⁵ But we *know* as fact that environmental

199. See David Stout, *A Black Businessman's Ordeal as a Suspect*, N.Y. TIMES, May 9, 1995, at B1. For accounts of other indignities suffered by black reporters, police officers, and lawyers, see generally ELLIS COSE, *THE RAGE OF A PRIVILEGED CLASS* (1993).

200. See Delgado & Stefancic, *supra* note 123, at 721.

201. See 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, 298 n.248 (1986).

202. See Delgado & Stefancic, *supra* note 123, at 719–20, 742.

203. See, e.g., *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (Chinese Exclusion Case) (upholding immigration statute excluding certain Chinese from entering United States).

204. See EVA HANKS ET AL., *ENVIRONMENTAL LAW AND POLICY* 1–92 (1974) (detailing utilitarian and nonutilitarian reasons for environmental protection); Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970) (natural resources are limited commodities that, if too rapidly consumed, will be unavailable for future generations). For the contrary, nonanthropomorphic view, see, for example, ALDO LEOPOLD, *A SAND COUNTY ALMANAC AND SKETCHES HERE AND THERE* (1949); Stone, *supra* note 139.

205. See JOHN MUIR, *MY FIRST SUMMER IN THE SIERRA* 110 (1991) ("[W]here we try to pick out

racism kills human beings by forcing unsafe concentrations of toxins upon minority communities.²⁰⁶ Our proposal would protect against *grave* and *certain* harm to human beings, while current law protects only against *unknown*, *potential* harm to human beings. Certainly it is better to protect human health directly, as our proposal does, rather than merely indirectly.”

“Sounds reasonable,” I said. “It also occurs to me that environmental law assumes a frequent tendency to distance ourselves from the natural world and sets out to counter this propensity,²⁰⁷ just as civil rights law seeks to curb the tendency to treat persons of other races as things. An interesting argument. But what’s your second one?”

(b) *To enable society to protect settled, as well as wild, environments*

“Our second overlaps with the first,” Giannina said. “Some environmentalists assume that the ESA exists only to protect wild environments uninhabited by human beings. But is it not at least as important to protect the settled environments in which we live? Maybe the answer to this is moral or ethical and can’t be answered with logic. But consider, for a moment, the elitism of many environmentalists, most of whom are well-to-do whites.²⁰⁸ Unlike impoverished, inner-city minorities, most environmentalists live in nice neighborhoods, close to the country.²⁰⁹ On weekends, they can get in their cars and drive to the mountains, where they can hike, camp, fish, and play.²¹⁰ No wonder they want to preserve the wilderness. In contrast, most inner-city minorities never get to see a forest tree or wilderness creature, let alone a redwood or spotted owl. Poor African-Americans or Latinos in Compton or the South Bronx, living among abandoned, burned-out buildings and shuttered storefronts, have more pressing needs than saving distant old-growth forests—namely, saving their own neighborhoods. This is true even in rural areas in the deep South, where many of the worst industrial hazards and many of our poorest African-Americans are concentrated.²¹¹ These threatened communities—our endangered

anything by itself, we find it hitched to everything else in the universe.”); see also EDWARD O. WILSON, *THE DIVERSITY OF LIFE* 133 (1992) (pointing out intricate interdependence of life forms on each other for food, support, and, at times, control of numbers).

206. See Regina Austin & Michael Schill, *Black, Brown, Poor, and Poisoned: Minority Grassroots Environmentalism and the Quest for Eco-Justice*, 1 KAN. J.L. & PUB. POL’Y 69 (1991).

207. See generally BRUCE MAZLISH, *THE FOURTH DISCONTINUITY* (1993) (noting that at several points in history, society has developed theories explaining why humans are separate from the rest of the natural world).

208. On the charge of elitism in the environmental movement, see Steven A. Light & Kathryn R.L. Rand, *Is Title VI a Magic Bullet? Environmental Racism in the Context of Political-Economic Processes and Imperatives*, 2 MICH. J. RACE & L. 1, 14 (1996).

209. See *id.*

210. See *id.*

211. See, e.g., Austin & Schill, *supra* note 206, at 70: “[I]n the South, a sparse concentration of inhabitants is correlated with poverty which is in turn correlated with race. [‘]It follows that criteria for siting hazardous waste facilities which include density of population will have the effect of targeting rural black communities that have high rates of poverty.[’]” *Id.* (quoting Conner Bailey & Charles E. Faupel, *Environmentalism and Civil Rights in Sumter County, Alabama*, in *PROCEEDINGS OF THE MICHIGAN CONFERENCE ON RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS*, 159, 171 (1990)).

species—need help. But environmentalists, living many worlds away, have yet to offer that help.²¹² We should be concerned about the *entire* environment and not create toxic ghettos to segregate away the pollution and degradation.”

When Rodrigo paused, Teresa added quietly, “If the wildlife federations or the Sierra Club want minorities to become involved, these groups need to do something for them. It may be out of their own self-interest, and not altruism, but as you mentioned, Rodrigo, interest-convergence may be the best hope at this point. We have to convince the environmental movement that protecting minority communities is as much in its interest as protecting the wilderness and that polluted neighborhoods are as worth saving as polluted forests. What’s your third argument?”

(c) *To protect the intrinsic value of human life*

“Oh!” Rodrigo started, having been lost in reflection for a moment. “Our third argument parallels the second. It’s simple. Animal lovers love the ESA. To them the statute finds its justification in its generous protection of the animals they hold dear. But surely human life is just as worthy of protection as that of animals such as Preble’s Meadow jumping mice. I don’t mean to be speciesist about it, but, after all, we’re surely as deserving of protection as a snail darter.”

“I certainly hope our fellow citizens agree,” I said. “Which raises a question, at least in my mind: Why do you think the ESA has not been extended to people?”

“I think elitism plays a role,” Giannina replied. “Environmentalists love their playgrounds, while poor, environmentally threatened minorities have too much to worry about to be concerned with Bambi’s safety. Their kids are inhaling carcinogens and dodging rats all day long! Wildlife concerns are an unaffordable luxury when you’re surrounded by smokestacks and toxic waste dumps.”

“Another reason might be that minorities, except for Indians, are not in danger of extinction. Instead, minority population numbers are increasing.²¹³ What do you say about that?” I asked, determined to press my two young friends as long as possible.

“That’s true,” Giannina replied, “but the Act does not require that a species be at imminent risk of extinction, only that it be endangered. Am I right, Mom?”

“You’re right,” Teresa replied.²¹⁴ “But an analogy from hunting comes to mind. I’m sure you’ve heard deer hunters insist that their favorite sport is necessary to thin the herd.”²¹⁵

212. See *supra* notes 197–98 and accompanying text; see also BENJAMIN H. GOLDMAN & LAURA FITTON, *TOXIC WASTES AND RACE REVISITED* (1994) (finding that environmental racism had worsened between 1980, when 25% of minorities lived adjacent to toxic waste dumps, and 1993, when that number increased to almost 31%).

213. See, e.g., William H. Frey, *America’s True Colors On a National Level*, ORLANDO SENTINEL, Aug. 9, 1998, at G1.

214. See *supra* notes 154–56, 160–61 and accompanying text.

215. See Gene Mueller, *Why “Bambi” is a Big Problem, And How Hunting Can Control Deer*

"I've heard that," I said. "They say that if X number of deer were not killed every year, the population would rapidly increase so that a deer would eventually be standing on every square inch of land."²¹⁶

"But we all know that's not true," Teresa replied. "Most wild animals automatically adjust their procreative rate to the amount of food available."²¹⁷ If hunters stopped their barbaric sport, the number of wildlife would increase, but just for a short time, until equilibrium was reached."²¹⁸

"And the three of you think that something similar operates in poor, American minority communities?" I asked.

"It seems likely," said Giannina. "Anthropologists tell us that in other societies, poor farmers have more children, because many of the children die young, and so the parents produce more to have enough to help them with the farm and to take care of them in their old age."²¹⁹

"Better prospects and a higher standard of living may be the best contraceptive," Teresa added. "There's nothing like hope to start women thinking about the future in positive terms. What's true in other societies may hold here, as well."

"So that the seemingly high reproductive rate in United States minority communities may be a function of desperation—of the high homicide rates, poor nutrition, and the blighted life choices that society offers them?"²²⁰ I asked.

"It's at least a plausible hypothesis," Rodrigo added. "Everyone knows the middle- and upper classes have much smaller families than everyone else."²²¹ If the high reproductive rate of the minority poor is a function of the terrible living conditions, with constant threats like those the deer receive from the hunters, then the term 'endangered' might well, plausibly, be applied to them despite their numbers' remaining constant or even growing."

Just then, Teresa's new clock, which until then had remained silent, let out a thunderous bellow; I imagined the sound of a buffalo or similar animal. "Oh, my," I said, looking up. "It's five o'clock already. Time certainly flies . . ."

"When you're having fun," said Giannina with an impish smile. "Well, you two had better set up your date if you're going on one. For our part, Rodrigo

Population, WASH. TIMES, Sept. 18, 1998, at G6; see also RICHARD NELSON, *HEART AND BLOOD: LIVING WITH DEER IN AMERICA* 23–26, 33, 134–36, 225, 235, 259 (1998).

216. See NELSON, *supra* note 216.

217. See Colleen Smith, *Crafty Canines Shake Off Efforts at Reduction*, DENV. POST ONLINE-LIFESTYLES (visited Mar. 28, 1999) <<http://www.denverpost.com/life/nature0321.htm>> (pointing out that coyotes do the same thing); see also PETER SINGER, *ANIMAL LIBERATION* 234 (2d ed. 1990) (discussing possibility that deer and other hunted animals exhibit similar behavior).

218. See *supra* note 217.

219. See Robert W. Kates, *Population, Technology, and the Human Environment: A Thread Through Time*, 125 DAEDALUS 43 (1996).

220. See *id.* (positing that economic development may be the best contraceptive).

221. See Charles E. Longino, Jr., & John R. Earle, *Who Are the Grandparents at Century's End?*, 20 GENERATIONS 13 (1996); John Herberg, *Census Data Reveal 70s Legacy: Poorer Cities and Richer Suburbs*, N.Y. TIMES, Feb. 27, 1983, at G1.

and I need to get going. Our Lamaze class starts in half an hour, and we don't want to be late. We could drop you off, Professor. It's on our way."

Minutes later, I was taking my leave of Teresa, ("By the way, call me Gus") and walking down the steps wishing we had had more time. As I stooped over to get into the back seat of Rodrigo and Giannina's little sports car, I said something vaguely complimentary to Giannina about her mother—I think, how rare it is to find a Euro-American of her generation with such a passionate commitment to both racial equality and environmentalism.

As Rodrigo smoothly accelerated the little car into the traffic in the direction of the women's center and my apartment, Giannina gave me a quick, but warm smile, and said, "She's a rare species. We'll all have to take good care to keep her well. Even without a statute."

I resolved that I, at least, would do my part, and looked forward to our meeting Wednesday and a new chapter that I hoped would include talk of children, race, the environment—and each other. I reminded myself, as well, to ask her (perhaps after we built up some rapport) whether she thought Giannina and Rodrigo meant their proposal about minority communities and the Endangered Species Act to be taken seriously or were proposing it only for effect. Just then, I heard a sudden intake of breath, Giannina said "Watch it!" and Rodrigo braked sharply to avoid a squirrel skittering across the roadway.

Well, well, I thought. I think I have my answer.

